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RIGHT OF ATTORNEY TO EMPLOY FULL TIME FOR ARGUMENT FREE FROM INTERRUPTIONS OF THE COURT.

Trial judges sometimes make a practice of interfering with the argument of attorneys, either to correct the speaker's construction of his instructions or to gratuitously advise him that his remarks are not in keeping with the evidence. The objection to interruptions of this kind are not that they are not well taken but because no allowance is made by the court for an extension of the time thus consumed by the interruption. An extravagant yet important case of this kind is the recent decision of the Missouri Court of Appeals in Neumann v. St. Louis Transit Co., 84 S. W. Rep. 189, where the court held that where interference by the court and opposing counsel with the argument of counsel to the jury is accompanied by so much discussion as to consume a large part of the time allotted him for argument, so that reasonable time is not left him, and, so far as he is remiss, it appears to be merely from not holding in mind just what comments on the evidence might be made in view of the instructions, further time should be granted.

The court expressed its opinion on this very interesting point of practice more at length in its opinion as follows: "While said attorney was attempting to deliver his opening argument to the jury, he was interrupted by the court four times in 7 1-2 minutes, and once by the attorney for the respondent. During that interval the speaker managed to utter words which occupy 53 lines of the printed record, the judge spoke 38 lines by way of reproof and elucidation of the issues, and the respondent's attorney 3 lines; that is, about one-half the time was consumed by the judge and the respondent's attorney. The reason assigned for these interruptions was that, in the opinion of the judge, appellant's counsel persisted in arguing to the jury theories of recovery which had been excluded from consideration by the instructions. It may be allowed that said counsel transgressed to some extent in that respect, but he appears to have done so from misunderstanding the instructions. Be that as it may, it was the duty of the trial court to keep the argument within the issues as defined by the instructions, and not permit it to digress to irrelevant matters. But so much of the speaker's time was taken up by the observations of the judge in calling his attention to matters he might properly discuss and in descanting on the meaning of the instructions, that the case was submitted to the jury practically without appellant's counsel having any opportunity to comment on the evidence. We gather from the record that, after he was stopped by the court telling him his time was half up, the respondent's counsel did not address the jury, and hence there was no further argument. The speaker complained that he had had no opportunity to argue the case, and was told it was his own fault, because he had not confined himself to the testimony. So far as we can see, the attorney had alluded to nothing in the course of his speech which was not in testimony, but had called attention to certain portions of the testimony which did not relate to the only ground of recovery submitted by the instructions, namely, that the appellant was thrown from the car by its running around a curve at a rapid speed. A verdict should never be insisted on by counsel on a hypothesis not warranted by the instructions of the court, and, if this is done, it is right for the court to interfere. But if the interference is accompanied by so much discussion as to consume a large part of the time allotted to the counsel for his argument, and that time is very short at best, it seems reasonable that the speaker should be granted further indulgence, unless he was perverse in disregarding the court's admonitions. Appellant's attorney behaved courteously toward the court, and, in so far as he was remiss, appears to have been so from not holding in mind, while he was attempting to address the jury, just what comments on the evidence might properly be made without his argument becoming inconsistent with the instructions."

It is a rule of law well sustained by authority that it is within the discretion of the court to determine the limit of time to which counsel are to be confined in argument, and, unless such discretion has been abused, the court of appeals will not interfere. But, as the court intimates in the

principal case, the parties to a cause upon trial have a right to a reasonable time to argue the facts to the jury, and an arbitrary and unreasonable restriction upon the summing up is an abuse of discretion, and is a ground for reversal. Nesbitt v. Walters, 38 Tex. 576; Zweitusch v. Long, 57 Ill. App. 106. And it is clear that the court's position in the principal case is a sound one under the general rule as thus stated for the plain reason that an unreasonable interruption of an attorney in his argument is an unreasonable limitation on the time which he has to argue the case.

A peculiar feature of the trial court's action in the principal case was its failure to allow plaintiff's attorney to conclude the latter half of his argument, on the ground that defendant's attorney declined to speak at all—an apparently shrewd move on the part of the defendant in view of the peculiar embarrassment of plaintiff's attorney. It appears that the latter divided the fifteen minutes allotted to each side, in two parts, intending to speak seven and one-half minutes in the opening address and seven and one-half minutes in the closing address. The court's interruptons were sufficient to cut this seven and one-half mnutes of the opening address down to less than one-half of this time, so that plaintiff's attorney had hardly three minutes in which to address the jury, clearly an unreasonable restriction on his time for argument. But suppose there had been no interruptions by the court, and suppose that under the peculiarly conflicting circumstances of the case, seven and one-half minutes would be held an unreasonable restriction upon the time of argument, would the fact that plaintiff thus divided his time in half give him any right to continue his argument seven and one-half minutes longer if defendant's attorney should have refused to argue the case? While no case exactly in point has arisen, yet there is one decision by the supreme court of Kansas that would seem to deny the right of plaintiff to so continue his argument under the circumstances. Southern Kansas Railway Co. v. Michaels, 49 Kan. 388, 30 Pac. Rep. 408. In that case the trial court informed the attorneys that each side would be given an hour and a quarter for argument, and plaintiff's attorney announced that he would consume thirty minutes only in opening, and requested the court to notify him when thirty minutes had expired. The court acted upon his suggestion, but defendant's attorney waived all argument on his part. The plaintiff's attorney, caught unawares and not having touched fully on the most important phases of the evidence, pleaded for more time, which the court refused. This was held not to be error for the reason that plaintiff had voluntarily divided his time and the defendant had been guilty of no misconduct by refusing to argue the case and thus preventing the possibility of a closing argument on the part of the plaintiff. These decisions are important for attorneys to remember, especially those on whom rests the burden of proof in cases in which the evidence is conflicting. Sometimes attorneys, in the desire to make an impressive closing address, especially in cases where the evidence is slightly against them, unreasonably divide the time allotted to them and confine their opening address into very narrow limits in order to allow themselves plenty of time in their closing address. A shrewd opposing attorney, especially where the evidence is in his favor, will take advantage of these circumstances and thus cut the plaintiff off altogether, by refusing to argue the case at all. Our personal view of a rule of law which works such a result is that it is clearly wrong on principle and should be modified at least to the extent of allowing the plaintiff to continue until he has had a reasonable time to present a full view of his side of the case to the jury. But, the law being as it is, it is our duty to call attention to the fact, that under the present decision of the courts, it is dangerous for a plaintiff to unreasonably restrict his opening argument to the jury.

NOTES OF IMPORTANT DECISIONS.

OBSCENITY— WHETHER INDECENT EXPOSURE OF PERSONS MUST BE SEEN.—Where a man indecently exposes his person in a public place, but is in fact seen by no one, is he guilty of an offense? The proposition is more abstract and theoretical than practical as it is hardly likely that the state would assume to prosecute the offense without witnesses. Yet the question has arisen on the question whether the indictment must allege that the exposure was seen. A recent case holds that such an allegation was unnecessary. We refer to

the case of State v. Martin, 101 N. W. Rep. 637, where the Supreme Court of Iowa held that one who exposes his person at a time and place when he is liable to be seen by others is guilty of the offense of indecent exposure, regardless of whether the exposure was actually seen by others or not. The court in its opinion, gave expression to the following views on this question. The court said: "The objection made, that the indictment does not show that the woman saw the indecent exposure of defendant's person, or that such exposure was without her consent cannot be sustained. It will be observed that the crime as defined by the statute does not require that the exposure shall be made in the actual sight of any person, and in the Bauguess Case we expressed the view that, 'if a case should be made by confession, corroborated by circumstances, a defendant might properly be convicted of this offense, although no person witnessed the indecent act.' It does not follow from this rule that one who uncovers his person in the privacy of his own apartment, or other place where there is no reason to suppose that his act may offend the sensibilities of others, is guilty of a crime. The words 'indecent exposure' clearly imply that the act is either in the actual presence and sight of others, or is in such a place or under such circumstances that the exhibition is liable to be seen by others, and is presumably made for that purpose, or with reckless and criminal disregard of the decencies of life. A person if so inclined, may dress himself in nothing more substantial than the innocense of Eden, provided he does not 'expose' himself in that condition. The exposure becomes 'indecent' only when he indulges in such practices at a time and place where, as a reasonable person, he knows, or ought to know, his act is open to the observation of others. Van Houten v. State, 46 N. J. Law, 16. 50 Am. Rep. 397. See also Laney v. State, 105 Ala. 105, 17 So. Rep. 107; Yancey v. State, 63 Ala. 141; State v. Roper, 18 N. Car. 208. Neither is there any merit in the contention of the appellant that the act charged is not alleged to have been done without the consent of the woman in whose presence the exposure is said to have been made. Assuming the exposure to have been made, the consent of the woman would not take away or affect its criminal character. The offense charged is not against the woman merely, but against organized society—the state—and is none the less henious because of the consent of the observer. People v. Bixby, 67 Barb. 221, 4 Hun, 636. We think the indictment sufficient, and that the motion in arrest based thereon was properly overruled."

WITNESSES—RIGHT OF ALLEGED WIFE TO TESTIFY IN SUPPORT OF HER CLAIM AS WIFE WHERE THE OTHER PARTY TO THE CONTRACT IS DEAD.—The question stated as the subject of this note is one of increasing importance, and one on which the courts are not all agreed. We discussed the subject fully in 57 Cent. L. J. 141, citing all the authorities. We there found that the weight of authority was against the proposition that an alleged wife should be permitted to testify in support of her claim to inherit the estate of her alleged husband, since deceased. Now, however, comes the recent case of Sorensen v. Sorenson, 100 N. W. Rep. 930, where the Supreme Court of Nebraska held that an alleged wife might testify against the administrator of her deceased husband.

The argument of the court is based on the peculiar wording of the Nebraska statute and is as follows: "The mother of the infant was permitted, over the objections of the petitioners, to testify to conversations and transactions had with the deceased. The purpose of this controversy was to establish a common-law marriage between herself and the intestate. It is claimed that she was incompetent by reason of the statute (section 329, Code Civ. Proc.), which provides that 'no person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness.' It may be conceded that the witness was interested, and the testimony is of conversations and transactions had between the witness and the deceased; yet, unless the adverse party is the representative of the deceased person, the evidence is not within the ban of the statute. This question has been considered upon the point in issue in McCoy v. Conrad, 64 Neb. 150, 89 N. W. Rep. 665, and the court said: 'If a party so placed in a litigation that he is called upon to defend that which he has obtained from a deceased person, and make the defense which the deceased might have made, if living, or to establish a claim which the deceased might have been interested to establish, if living, then he may be said in that litigation to represent a deceased person; but where he is not standing in the place of the deceased person, and asserting a right of the deceased which has descended to him from the deceased (that is, where the right of the deceased himself, at the time of his death, is not in any way involved), and the question is, not what was the right of the deceased at the time of his death, but merely to whom has the right descended, in such a contest neither party can be said to represent the deceased.' Tested by the above rule, it is clear that neither the petitioners nor the cross petitioner can be said to be the representative of the decedent in this action. But it is insisted that the administrator is, and as against him the testimony is within the bar of the statute. The administrator can have no interest by virtue of his office in the result of this action. It will not take from nor add to the estate. He is now a mere stakeholder, and the sum of his official duties is to pay over — that is, distribute—the proceeds of this estate as the court may direct. The purpose

of this action is to ascertain to whom it shall be distributed. As said in the former opinion (98 N. W. Rep. 837): 'They (the claimants) occupied a position analogous to that of rival claimants for the same fund, who have been brought before a court of equity by a bill of interpleader requiring them to interplead for the fund, in order that their respective rights may be ascertained and determined and the plaintiff exonerated.' This is not the administrator's controversy. It belongs to the rival claimants, and the office should not be used by either party as a rampart to fight behind. The witness, we think, was competent to testify in this action. Bollinger v. Wright (Cal.), 76 Pac. Rep. 1108."

DOCTRINE OF PREVIOUS JEOPARDY.

Introduction.—The word jeopardy in its broadest significance is accepted to mean danger, hazard, or peril, and Webster so defines it. In legal contemplation "the term jeopardy is used to designate the danger of conviction and punishment which the defendant in a criminal action incurs when a valid indictment has been found, and a petit jury has been impanelled and sworn to try the case and give a verdict."[1]

Earliest Enunciation of the Principle.—The earliest enunciation of the principle upon which the modern doctrine of previous jeopardy rests is found in the civil law. There it is embodied in the maxim "*non bis in idem*"—"not twice for the same."[2] That is to say, a man shall not be twice tried and punished for the same crime. While this seems to be the first embodiment of the principle in written law, yet it may not be an unjustified assumption that it has been for all time a part of that universal law of reason, justice and conscience, of which Cicero said: "Nor is it one at Rome and another at Athens, one now and another in the future, but among all nations it is the same."[3] As a natural consequence, the common law early recognized the principle and gave it expression in two maxims, "*nemo debet bis vexari pro una et eadem causa*,"—"no man shall be twice vexed for one and the same cause,"[4] applicable to civil cases, and "*nemo debet bis puniri pro uno delicto*,"—"no one shall be twice punished for the same crime,"[5] which guards the rights of defendants in criminal actions. When the barons wrested the *Magna Charta* from King John this provision was incorporated in that bulwark of English liberty.[6] Speaking of the early expression of the principle and the necessity of its recognition, Mills, J., whom Mr. Justice Miller deemed "one of the best common law judges that ever sat on the bench of the Court of Appeals of Kentucky,"[7] says: "Every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration, and that on a revolution of sentiment, those who had been acquitted of all crime, under a former reign, might be subjected anew to prosecution, and that a despot, by frequently arraigning and trying an accused political enemy, might ultimately put him down, so that he could no longer annoy the existing power. To prevent these mischiefs, the ancient common law as well *Magna Charta* itself, provided that an acquittal or conviction should satisfy the law; or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois acquit* and *autrefois convict*."[8]

Later Enunciations Of The Principle.—Coming now to the later enunciations of the principle and instinctively seeking first the constitution of the United States, it there takes this form: "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[9] In similar terms, the framers of the constitutions of most of the states have incorporated in the fundamental law of their respective sovereignties, a like provision. Not all the states however, have provided against double jeopardy. The constitutions of Connecticut, Maryland, Massachusetts, North Carolina, Virginia and Vermont, as to this are silent.[10] Nevertheless, the common law doctrine is recognized and applied in these jurisdictions. In Indiana the right of immunity from a second jeopardy is secured by that section of the state consti-

[1] Am. & Eng. Ency. of Law (2d Ed.), 581.
[2] Code, 2, 9, and 11. See Merlin, Repertoire. Article *non bis in idem*.
[3] Lactantius Inst. Div. bk. 7, ch. 8.
[4] 17 Am. Law Review, 735.
[5] 4 Bl. Com. 315, 335; 2 Hawkins' Pleas of the Crown, 377.
[6] Com. v. Olds, 5 Litt. (Ky.) 137; *Ex parte* Bradley, 48 Ind. 548.
[7] *Ex parte* Lange, 18 Wall. (U. S.) 163.
[8] Com. v. Olds, 5 Litt. (Ky.) 137.
[9] Constitution of United States, Amendment 5.
[10] 17 Am. Law Review, 735.

tution which provides that "No person shall be put in jeopardy twice for the same offense."[11]

Scope of the Doctrine.—While the universality of the principle is unquestioned, the conception of the scope of the doctrine is not identical in all jurisdictions. The law seems now to be well settled that the provision of the constitution of the United States prohibiting a second jeopardy does not bind the states, but applies only to offenses against, and trials under, the laws of the United States.[12] It was early held, however, that this provision was binding upon the states and that they could not act independently of it.[13] But the courts have experienced far more difficulty in determining to what class or grade of crimes the words "life and limb" and "jeopardy," as found in the different constitutions, apply. The earlier cases hold that these words apply strictly to the higher crimes,[14] the Supreme Court of the United States going so far in one case as to hold the application strictly to capital felonies.[15] By weight of later authority the provision is given a more liberal construction and is held to apply to all indictable offenses, including misdemeanors.[16] Notwithstanding, there is an apparent tendency in some jurisdictions to hold the doctrine more strictly in the higher crimes, particularly those punishable with death, rather than in ordinary misdemeanors.[17] Following these decisions, the Supreme Courts of Arkansas and Missouri hold that the doctrine does not apply to misdemeanors punishable by fine alone.[18]

[11] Constitution of Indiana, art. 1, sec. 14.

[12] Barrows v. Baltimore, 7 Pet. (U. S.) 243; Fox v. Ohio, 5 How. (U. S.) 410; Twitchell v. Commonwealth, 7 Wall. (U. S.) 321; United States v. Gilbert, 2 Sumn. (U. S.) 19; United States v. Barnhart, 22 Fed. Rep. 285.

[13] State v. Moore, Walk. (Miss.) 134; People v. Goodwin, 18 Johns. (N. Y.) 187.

[14] *Ex parte* Lange, 18 Wall. (U. S.) 163; Brink v. State, 18 Tex. App. 344; People v. Goodwin, 18 Johns. (N. Y.) 200; Commonwealth v. Roby, 12 Pick. (Mass.) 496; State v. Smith, 53 Ark. 24.

[15] United States v. Gilbert, 2 Sumn. (U. S.) 19.

[16] *Ex parte* Lange, 18 Wall. (U. S.) 163; Berkowitz v. United States, 93 Fed. Rep. 452; Williams v. Commonwealth, 78 Ky. 97; State v. Cheevers, 7 La. Ann. 40; Brink v. State, 18 Tex. App. 344; State v. Lee, 10 R. I. 494.

[17] Bishop, Crim. Law (7th Ed.), sec. 990. See People v. Olcott, 2 Johns. (N. Y.) 301; Williams v. Commonwealth, 2 Gratt. (Va.) 567; Commonwealth v. Cook, 6 Serg. & R. (Pa.) 577.

[18] Warwick v. State, 47 Ark. 568; State v. Spear, 6 Mo. 644.

Essential Elements of Jeopardy. — Before legal jeopardy can arise there must be a concurrence of several essential elements. They may be said to be (*a*) a court of competent jurisdiction; (*b*) a sufficient indictment or information; (*c*) a joinder of issue; and (*d*) a legal jury charged with the prisoner.[19] The Supreme Court of Indiana has made the following statement of the necessary components of legal jeopardy: "When a valid indictment has been returned by a competent grand jury to a court having jurisdiction; the defendant has been arraigned and pleaded; a jury been impaneled, sworn, and charged with the case; and all the preliminary things of record are ready for the trial; the jeopardy contemplated by the constitution has then attached, and the defendant is entitled to a verdict."[20] While the preponderance of judicial opinion sustains this rule, it has been held in some jurisdictions, however, that jeopardy does not attach until a valid verdict of acquittal or conviction has been rendered.[21]

A Court of Competent Jurisdiction. — In the words of Mr. Justice Miller, "No matter how far the proceedings may go there is no jeopardy unless the court has jurisdiction."[22] If the court before whose bar the defendant is arraigned has no jurisdiction of the offense, he cannot be in jeopardy, as the proceedings are *coram non judice* and absolutely void.[23] So if one is convicted of a crime wholly without authority of law, he cannot base a plea of previous jeopardy on such conviction.[24] Likewise when the statute creating or conferring jurisdiction upon a court is unconstitutional, a conviction by it is absolutely void, and is

[19] United States v. Van Vliet, 23 Fed. Rep. 35, United States v. Shoemaker, 2 McLean (U. S.), 114; Shideler v. State, 129 Ind. 527; Boswell v. State, 111 Ind. 47; Sanders v. State, 85 Ind. 319; Halloran v. State, 80 Ind. 589; Joy v. State, 14 Ind. 134.

[20] Morgan v. State, 13 Ind. 215.

[21] State v. Taylor, 34 La. Ann. 981; State v. Elden, 41 Me. 165; Anderson v. State, 86 Md. 479; People v. Meakim, 61 Hun (N. Y.), 327.

[22] *Ex parte* Lange, 18 Wall. (U. S.) 163. See also United States v. Ball, 163 U. S. 662; Joy v. State, 14 Ind. 139.

[23] O'Brian v. State, 12 Ind. 369; State v. Odell, 4 Blackf. (Ind.) 156; Reich v. State, 53 Ga. 73; Severin v. People, 37 Ill. 414; Commonwealth v. Peters, 33 Mass. 387; People v. Tyler, 7 Mich. 171; Montrose v. State, 67 Miss. 429; Marston v. Jenness, 11 N. H. 156; State v. Britton, 48 N. J. L. 371.

[24] Packer v. People, 8 Colo. 361.

no bar to another prosecution for the same offense.[25] An acquittal or conviction in a court of the United States, of a defendant who is there indicted for an offense of which that court has no jurisdiction, is no bar to a subsequent indictment in a state court.[26] There can be no jeopardy attaching when one is put on trial before a judge and jury at a special term of court not called as authorized by law.[27] A person is not put in jeopardy by an acquittal or conviction by a justice of the peace or a police magistrate having no jurisdiction of the offense.[28] Nor is a plea of former conviction, on an indictment for felony, supported by proof of an acquittal of the same charge before a justice of the peace, and a conviction of a misdemeanor, included in such felony, the justice of the peace having no jurisdiction over felonies.[29] Again, if a judge sitting at the trial of a cause is incompetent to try it, by reason of relationship to the defendant, or by having been appointed special judge without authority, the court is without jurisdiction and the defendant is not put in jeopardy.[30] When two courts have concurrent jurisdiction of an offense, the court first assuming jurisdiction takes exclusive cognizance of the case, and an acquittal or conviction in one will bar a prosecution in another.[31] However, a conviction or acquittal by a court on a charge of which it has jurisdiction only to examine the accused and hold to bail, or discharge, is void, and no bar to an indictment for the same offense.[32] Nor does a conviction or acquittal in a case where the preliminary jurisdictional requirements, as complaint, process, and the like, have been omitted, preclude a subsequent indictment.[33]

A Sufficient Indictment or Information.—In order to sustain a plea of former jeopardy, the acquittal or conviction relied upon must have been upon a valid indictment or information, sufficient in form and substance to sustain a conviction.[34] If the acquittal or conviction was had on a good indictment, it is a bar to a subsequent prosecution for the same offense, though no judgment is entered.[35] The accused is never in jeopardy at any time when the indictment is so invalid that judgment on it will be annulled on appeal.[36] This is true regardless of the stage of proceedings when it is quashed for that reason.[37] Hence, if the indictment is defective and is quashed on the motion of the defendant, he has not been put in jeopardy though the jury be sworn.[38] But if the indictment or information is valid and is dismissed without the defendant's consent, after jeopardy has attached, he cannot again be prosecuted for the same offense.[39] A *nolle prosequi* entered even after the jury is impaneled and proof heard, will not bar another prosecution for the same offense if the indictment is bad.[40] But the rule is otherwise where the indictment is good and a *nolle prosequi* is entered without the consent of the defendant.[41] If the indictment is so defective that the merits could not be tried. and no judgment, either of conviction or acquittal could be pronounced upon it, there is no jeopardy.[42] Where the indictment is quashed because of

[25] Rector v. State, 6 Ark. 187.

[26] Commonwealth v. Peters, 12 Met. (Mass.) 387; Blyew v. Commonwealth, 91 Ky. 200.

[27] Dunn v. State, 2 Ark. 229; Matter of McClaskey, 2 Okla. 568; People v. Webb, 38 Cal. 467.

[28] State v. Morgan, 62 Ind. 35; State v. George, 55 Ind. 437; O'Brian v. State, 12 Ind. 369; State v. Odell, 4 Blackf. (Ind.) 156.

[29] State v. Morgan, 62 Ind. 35; State v. Nichols, 38 Ark. 550.

[30] People v. Connor, 142 N. Y. 130; Glasgow v. State, 9 Baxt. (Tenn.) 485.

[31] Houston v. Moore, 5 Wheat. (U. S.) 29; United States v. Barnhart, 22 Fed. Rep. 285; Bryant v. State, 72 Ind. 400; Bruce v. State, 9 Ind. 206.

[32] State v. Morgan, 62 Ind. 35; O'Brian v. State, 12 Ind. 369.

[33] Commonwealth v. Alderman, 4 Mass. 477; Bigham v. State, 59 Miss. 529.

[34] United States v. Olsen, 57 Fed. Rep. 579; United States v. Jones, 31 Fed. Rep. 725; Joy v. State, 14 Ind. 139.

[35] State v. Norvell, 2 Yerg. (Tenn.) 24.

[36] United States v. Jones, 31 Fed. Rep. 725; Shepler v. State, 114 Ind. 194; Davidson v. State, 99 Ind. 366.

[37] Joy v. State, 14 Ind. 139; Weston v. State, 63 Ala. 155.

[38] Joy v. State, 14 Ind. 139; State v. Priebnow, 16 Neb. 131; State v. Sherburne, 58 N. H. 535.

[39] Commonwealth v. Hart, 149 Mass. 7; People v. Taylor, 117 Mich. 583; Williams v. State, 42 Ark. 35.

[40] United States v. Shoemaker, 2 McLean (U. S.), 114; Joy v. State, 14 Ind. 139; Walton v. State, 3 Sneed (Tenn.), 687; Branch v. State, 20 Tex. App. 599; State v. Crutch, 1 Houst. Crim. C. (Dela.) 204.

[41] United States v. Shoemaker, 2 McLean (U. S.), 114; United States v. Farring, 4 Cranch (C. C.), 465; Boswell v. State, 111 Ind. 49; Halloran v. State, 80 Ind. 589; Joy v. State, 14 Ind. 146; Harker v. State, 8 Blackf. (Ind.) 540.

[42] State v. Williams, 5 Ind. 82; Johnson v. State, 82 Ala. 29; State v. Ward, 48 Ark. 36; People v. Clark, 67 Cal. 99; State v. Smith, 88 Iowa, 178; Mount v. Commonwealth, 63 Ky. 93; State v. Owen, 78 Mo. 367.

the incompetency of some of the grand jurors finding it, the defendant cannot resist a new trial on the ground of a previous jeopardy.[43] Neither does jeopardy arise on the trial when the indictment is found by an illegally organized grand jury.[44] Where there has been a conviction on a void indictment, not followed by punishment, such a conviction is not a bar to a subsequent indictment.[45] But when a judgment is rendered upon a verdict of "guilty," found upon an invalid indictment, the defendant cannot again be prosecuted for the same offense while the judgment remains unreversed.[46] Nor can a person convicted under a void indictment, upon whom the penalty has been inflicted in full, be again prosecuted for the same offense.[47] But a partial endurance of punishment will not bar another prosecution where the proceedings are reversed on the defendant's motion, as he is deemed to have thereby waived his jeopardy.[48] Nor is the accused in jeopardy when a judgment on an indictment or information is arrested for a defect therein.[49] Again, there may be a second trial without violating the doctrine of previous jeopardy, when the indictment which formed the basis of the first trial described no offense known to the law.[50] For instance, a conviction on an indictment for "unlawfully carrying a dangerous weapon," when the statutes recognize no such offense, is no bar to a prosecution for a statutory offense.[51]

In a late case in the Supreme Court of the United States, it was held that when there was a former acquittal on the merits, there could not be a subsequent trial, even though the former indictment was insufficient.[52] This rule has been adopted by statute in several of the states.[53]

A Joinder of Issue.—There can be no jeopardy until an issue has been formed.[54] Unless the defendant has been arraigned and has plead, or, having refused to plead, a plea has been entered for him, he is not in jeopardy.[55] So if there be no arraignment, nor a waiver of it, the trial is a nullity and no jeopardy attaches.[56] This is true, although the jury be impaneled and sworn,[57] proof heard,[58] and even though a verdict of "guilty" has been rendered.[59] Nor is an issue formed by the interposition, by the defendant, of a plea of "guilty," impelled by fear, or made under duress.[60] If the clerk of the court erroneously enter a plea of "not guilty," the defendant not having plead, no jeopardy attaches.[61] So in a prosecution for felony, a plea of "not guilty," interposed by an attorney, does not place the accused in jeopardy, as such plea must be pleaded by the defendant in person, and that fact should appear of record.[62]

A Legal Jury Charged with the Accused.—The jeopardy contemplated by the constitution does not attach until a legal jury[63] has been charged with the prisoner. There must be a complete panel of jurors. Any less number renders the trial an absolute nullity.[64] A trial without a jury, when the right to a jury trial exists, is a nullity, and not a

[43] Joy v. State, 14 Ind. 139; State v. Scott, 99 Iowa, 36; Weston v. State, 63 Ala. 155; People v. March, 6 Cal. 543.

[44] Finley v. State, 61 Ala. 201; Kolheimer v. State, 39 Miss. 548.

[45] United States v. Jones, 31 Fed. Rep. 725; Simco v. State, 9 Tex. App. 338.

[46] Murphy v. Massachusetts, 177 U. S. 155; United States v. Ball, 163 U. S. 670; United States v. Olsen, 57 Fed. Rep. 580; State v. George, 53 Ind. 438.

[47] United States v. Jones, 31 Fed. Rep. 725.

[48] Jeffries v. State, 40 Ala. 381; Cochrane v. State, 6 Md. 400; State v. Watson, 20 R. I. 354.

[49] People v. Eppinger, 109 Cal. 294; State v. Watson, 20 R. I. 354.

[50] *Ex parte* Lange, 18 Wall. (U. S.) 163; Shepler v. State, 114 Ind. 194; Davidson v. State, 99 Ind. 366.

[51] Davidson v. State, 99 Ind. 366.

[52] United States v. Ball, 163 U. S. 662.

[53] Commonwealth v. Goulet, 160 Mass. 276; People v. Harding, 53 Mich. 481; Croft v. People, 15 Hun (N. Y.) 484; Mixon v. State, 35 Tex. Cr. Rep. 458; Tufts v. State (Fla.), 27 So. Rep. 218; Hurt v. State, 25 Miss. 378; Harp v. State, 59 Ark. 113.

[54] Boswell v. State, 111 Ind. 47; Lee v. State, 26 Ark. 260; Bell v. State, 44 Ala. 393; State v. Heard, 49 La. Ann. 375; Murphey v. State, 25 Neb. 807; Yerger v. State (Tex.), 41 S. W. Rep. 621.

[55] United States v. Riley, 5 Blatchf. (U. S.) 204; Ledgerwood v. State, 134 Ind. 81; Harbin v. State, 133 Ind. 698; Joy v. State, 14 Ind. 139.

[56] Davis v. State, 38 Wis. 487; Newsom v. State, 2 Kelley (Ga.). 60.

[57] United States v. Riley, 5 Blatchf. (U. S.) 204.

[58] State v. Bronkol, 5 N. Dak. 507; Disney v. Commonwealth (Ky.), 58 S. W. Rep. 360.

[59] Link v. State, 3 Heisk. (Tenn.) 252.

[60] Sanders v. State, 85 Ind. 318.

[61] Phillips v. People, 88 Ill. 160.

[62] State v. Conkle, 16 W. Va. 736.

[63] State v. Robinson, 46 La. Ann. 772; Helm v. State, 66 Miss. 537; State v. Hubbell, 18 Wash. 482.

[64] Moore v. Clegg, 72 Ind. 358; Allen v. State, 54 Ind. 461; Brown v. State, 16 Ind. 496; Brown v. State, 8 Blackf. (Ind.) 561.

putting in jeopardy, if either party claim that right.[65] But the accused may be put in jeopardy by a trial before a court of competent jurisdiction without a jury, where he has no right to demand a jury trial.[66] Or if the accused is entitled to demand a trial by jury, yet does not do so, but pleads guilty, such plea is a waiver of his right, and he is in jeopardy.[67]

The jury is charged with the prisoner when it has been impaneled and sworn to try him on the charge preferred.[68] Or, in the words of the Supreme Court of Georgia: "What we understand by charging the jury with the case, or submitting the case in charge to the jury is, that they are thus charged to make inquiry into the truth of the fact alleged on one side and denied on the other."[69] Thus whenever a person shall have been given in charge to a regular jury, he has been put in jeopardy.[70] While the weight of authority sustains the rule that jeopardy attaches the moment a legal jury has been charged with the accused, there is, however, a considerable holding to the effect that jeopardy does not attach until verdict is rendered.[71]

Limitations of the Rule. — While the foregoing has been a general statement of the rule, there are some qualifications or limitations of it which should be observed.

Preliminary Examination.—Jeopardy does not arise upon the preliminary examination of the accused, or upon the determination of matters collateral to his guilt or innocence.[72] So there is no jeopardy attaching on examination by the grand jury; and their failure to find an indictment is no bar to a subsequent indictment and prosecution thereunder.[73] But in Indiana, if the grand jury fail to find an indictment, there can be no subsequent prosecution by information.[74] When the accused is brought before a committing magistrate, with power only to discharge or bind over to the grand jury, a discharge by such magistrate will not be sufficient to enable the accused to maintain a plea of former jeopardy.[75]

Nolle Prosequi.—Any time before jeopardy attaches, a *nolle prosequi* may be entered, without being in effect a bar to a later prosecution for the same offense.[76] But if it is entered after jeopardy attaches, and without the consent of the defendant, it operates as an acquittal, and the accused will not be subject to a second jeopardy.[77]

Discharge of the Jury.—If the jury be discharged in a trial on a valid indictment, before a competent court, without the consent of the defendant, such discharge is in effect an acquittal and a bar to further proceedings against the defendant, unless the dismissal of the jury be demanded by absolute necessity.[78] What is an absolute necessity, or, as it has been called, "a sudden and uncontrollable emergency,"[79] such as would not render the discharge of a jury a bar to another trial, is largely to be determined by the facts of each case. It has been decided that the sickness of the trial judge,[80] of the accused,[81] or of a juror,[82] are such contingencies, the happening of which justifies the discharge of the jury. If, before the completion of the trial, the term of court, as fixed by law, comes to an end, the defendant has not been in jeopardy and the jury may be discharged without affecting the right of the state to institute subsequent proceedings.[83] But if the court has authority, under the statute,

[65] State v. Mead, 4 Blackf. (Ind.) 309.

[66] Bryant v. State, 72 Ind. 400; Trittipo v. State, 13 Ind. 360; Bruce v. State, 9 Ind. 206.

[67] Trittipo v. State, 13 Ind. 360; State v. Layne, 96 Tenn. 668.

[68] United States v. Van Vliet, 23 Fed. Rep. 35; Joy v. State, 14 Ind. 139; Hilands v. Commonwealth, 111 Pa. St. 1.

[69] Newsom v. State, 2 Kelley (Ga.), 60.

[70] Maden v. Emmons, 83 Ind. 331; State v. Walker, 26 Ind. 346; Morgan v. State, 13 Ind. 215; Wright v. State, 5 Ind. 292; Weinzorpflin v. State, 7 Blackf. (Ind.) 186.

[71] United States v. Perez, 22 U. S. 579.

[72] Chase v. State (Tex. 1900), 55 S. W. Rep. 833.

[73] State v. Whipple, 57 Vt. 637; *Ex parte* Clarke, 54 Cal. 412.

[74] State v. Boswell, 104 Ind. 541.

[75] State v. Hattabaugh, 66 Ind. 223; State v. Morgan, 62 Ind. 35.

[76] United States v. Shoemaker, 2 McLean (U. S.), 114; Dye v. State, 130 Ind. 87; Halloran v. State, 80 Ind. 589.

[77] Mount v. State, 14 Ohio, 295; Jones v. State, 55 Ga. 625.

[78] Boswell v. State, 111 Ind. 47; Daggett v. Bonewitz, 107 Ind. 276; Doles v. State, 97 Ind. 555; Maden v. Emmons, 83 Ind. 331.

[79] United States v. Shoemaker, 2 McLean (U. S.), 114.

[80] People v. Hunckeler, 48 Cal. 334. See also State v. Tatman, 59 Iowa, 471.

[81] People v. Goodwin, 18 Johns. (N. Y.) 187.

[82] United States v. Perez, 22 U. S. 579; Doles v. State, 97 Ind. 555; State v. Nelson, 26 Ind. 368. *Contra* Rulo v. State, 19 Ind. 298.

[83] Wright v. State, 5 Ind. 290.

to extend the term, he is not justified in discharging the jury and their dismissal will bar a further prosecution.[84] Neither is a second trial barred when a jury is discharged for the incompetency[85] or misconduct[86] of a juror; and the state may successfully insist upon a second trial when the defendant has tampered with the jury and it has been discharged for that reason.[87] The contingency most frequently arising which necessitates the discharge of the jury, is their failure to agree. It was early held that the inability of the jury to agree did not warrant their discharge by the court.[88] The modern cases, however, are in accord that the discharge of the jury, after their best efforts to agree upon a verdict, does not operate as a bar to another prosecution.[89] But the jury must be given a reasonable time to reach an agreement, and if discharged before the expiration of such a time, the discharge will operate as an acquittal.[90] What is a reasonable time, and other questions germane to the discharge of a jury, are matters resting in the sound discretion of the court.[91] The accused must be present at the discharge,[92] and the record must show the ground of dismissal.[93]

Fraudulent Procurement.—A plea of former jeopardy cannot avail the defendant on the second trial when the former conviction or acquittal was brought about by the wrongful procurement of the defendant.[94] Or, if the former acquittal or conviction was had by means of fraud and collusion on the part of the accused, a subsequent trial will not be barred.[95] However, it has been held in certain jurisdictions, that in such case, if the legal penalty is an exact and ascertained one, and the accused has suffered it in full, that a subsequent prosecution is barred.[96] Further, in this connection, it is interesting to note that it has been held in Indiana, that when the state is represented by its sworn officer (in this case the prosecuting attorney), a conviction is not void because he was corrupted during the pendency of the proceeding, and while unreversed it will bar another prosecution for the same offense.[97]

The "Same Offense." — The constitutional inhibition of a second jeopardy for the "same offense" has given rise to a number of difficult questions regarding the identity of offenses. It is well settled that the plea of former jeopardy cannot be successfully interposed to bar a second trial unless the offenses charged in both indictments are the same in law as well as in fact.[98] If it appears that the second prosecution is for the same offense as the first, it will be barred, though the offense is called by another name.[99] The test for determining when offenses are identical is given by Bishop in his work on Criminal Law as follows:

"The test is, whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be."[100]

If the offense for which the defendant was tried on the first trial included a lesser one which was a necessary part of the higher crime but merely a different degree, a conviction or acquittal of the higher offense will bar a subsequent prosecution for the lower one.[101] It is also the generally accepted rule that a con-

[84] Miller v. State, 8 Ind. 325; Reese v. State, 8 Ind. 416; Weinzorpflin v. State, 7 Blackf. (Ind.) 186.

[85] United States v. Morris, 1 Curt. (U. S.) 23; Commonwealth v. McCormick, 130 Mass. 61. *Contra*, O'Brian v. Commonwealth, 1 Bush (Ky.), 333; Poage v. State, 3 Ohio St. 229.

[86] State v. Washington, 89 N. Car. 535; State v. Hall, 9 N. J. Law, 256.

[87] State v. Wiseman, 68 N. Car. 203.

[88] Weinzorpflin v. State, 7 Blackf. (Ind.) 186.

[89] United States v. Perez, 22 U. S. 579; Shaffer v. State, 27 Ind. 131; State v. Walker, 26 Ind. 346; State v. Nelson, 26 Ind. 366.

[90] State v. Leunig, 42 Ind. 541.

[91] United States v. Haskell, 4 Wash. C. C. (U. S.) 408; State v. Walker, 26 Ind. 346; McCorkle v. State, 14 Ind. 39.

[92] State v. Wilson, 50 Ind. 487.

[93] United States v. Morris, 1 Curt. (U. S.) 23; Foote v. Silsby, 1 Blatchf. (U. S.) 445.

[94] Halloran v. State, 80 Ind. 586.

[95] De Haven v. State, 2 Ind. App. 376; Shideler v. State, 129 Ind. 526; Halloran v. State, 80 Ind. 590; Watkins v. State, 68 Ind. 427.

[96] McFarland v. State, 68 Wis. 400; Commonwealth v. Loud, 3 Met. (Mass.) 328.

[97] Shideler v. State, 129 Ind. 523.

[98] United States v. Wilson, 7 Pet. (U. S.) 150; Wilkinson v. State, 59 Ind. 416; Commonwealth v. Roby, 12 Pick. (Mass.) 496.

[99] Wininger v. State, 13 Ind. 540; State v. McCory, 2 Blackf. (Ind.) 5.

[100] Bishop on Criminal Law, Vol. 1, sec. 1052. See also Stone v. United States, 64 Fed. Rep. 667; Freeman v. State, 119 Ind. 501.

[101] United States v. Houston, 4 Cranch (C. C.), 267; Hamilton v. State, 36 Ind. 280.

viction or acquittal of a lesser offense included in a greater, will bar a prosecution for the greater, if, on an indictment for the greater, there could have been a conviction of the lesser offense.[102] If, however, after the first prosecution, a new consequence, for which the defendant is responsible, intervenes, which, taken with the facts then existing, constitutes a new and distinct crime, a prosecution for the first offense will be no bar to an indictment for the new offense.[103] So if there be an acquittal or conviction of an assault, and later the death of the person assaulted ensues as a result of such assault, the defendant may be indicted for murder.[104]

When the same transaction includes several distinct crimes, a prosecution for one is no bar to a prosecution for the others;[105] but when the same act constitutes a crime against several individuals, an acquittal or conviction as to one, bars a subsequent prosecution as to another;[106] and if a prosecution is had for any part of a single crime, it will bar any further prosecution for the whole crime or any other part of it.[107]

Where the offense of which the defendant has been convicted or acquitted was a continuing one, such conviction or acquittal will bar a subsequent prosecution for the same offense charged to have been committed prior to the first indictment,[108] unless that indictment charged the commission of the crime from one stated time to another, in which case, the prosecution will be no bar to another indictment for the commission of the crime at a prior time.[109]

If there are two co-defendants indicted jointly, an acquittal or conviction of one of them will be no bar to a prosecution of the other.[110] If a person by his single act violate the laws of two jurisdictions, as those of the United States and the state of Indiana, he may be tried by either, and a prosecution by one will not bar a prosecution by the other.[111] So when the act is a violation of a state law and a municipal ordinance, the general rule is that a prosecution for the violation of the one will be no bar to a prosecution for the violation of the other.[112] This was formerly the rule in Indiana,[113] but has not been since the enactment of the following statute:

"Whenever any act is made a public offense against the state by any statute and the punishment prescribed therefor, such act shall not be made punishable by any ordinances of any incorporated city or town; and any ordinance to such effect shall be null and void, and all prosecutions for any such public offense as may be within the jurisdiction of the authorities of such incorporated cities or towns, by and before such authorities, shall be had under the state law only."[114]

Similar statutes have been enacted in a number of the states.[115]

ELMER E. SCOTT.

Indianapolis, Indiana.

[102] *In re* Bennett, 84 Fed. Rep. 324; Hamilton v. State, 36 Ind. 280; Hickey v. State, 23 Ind. 21; Jackson v. State, 14 Ind. 327. *Contra*, State v. Foster, 33 Iowa, 525.

[103] Commonwealth v. Evans, 101 Mass. 25.

[104] Hopkins v. United States, 4 App. Cas. (D. C.) 430; State v. Howe, 27 Oreg. 143.

[105] United States v. Harrison, 3 Sawy. (U. S.) 556; De Haven v. State, 2 Ind. App. 380; State v. Elder, 65 Ind. 282. *Contra*, Gunter v. State, 111 Ala. 23.

[106] Clem v. State, 42 Ind. 420.

[107] United States v. Miner, 11 Blatchf. (U. S.) 511; State v. Elder, 65 Ind. 32.

[108] Neilson, Petitioner, 131 U. S. 176; Freeman v. State, 119 Ind. 502.

[109] Commonwealth v. Keefe, 7 Gray (Mass.), 332; Huffman v. State, 23 Tex. App. 491.

[110] Goforth v. State, 22 Tex. App. 405; People v. Bruzzo, 24 Cal. 41.

[111] United States v. Barnhart, 22 Fed. Rep. 285; State v Moore, 6 Ind. 436; Commonwealth v. Barry, 116 Mass. 1.

[112] Hankins v. People, 106 Ill. 628; McRea v. Mayor, 59 Ga. 168; Hughes v. People, 29 Cal. 257; Mobile v. Allaire, 14 Ala. 400.

[113] Waldo v. Wallace, 12 Ind. 582; Ambrose v. State, 6 Ind. 351.

[114] Burns' Rev. Stat. 1901, sec. 1709. See also City of Indianapolis v. Higgins, 141 Ind. 1.

[115] People v. Hanrahan, 75 Mich. 611; State v. Thornton, 37 Mo. 360; State v. Cowan, 29 Miss. 330.

TRIAL—COMMENT BY TRIAL JUDGE ON EVIDENCE.

STATE v. THIELD.

Supreme Court of Washington, December 22, 1904.

A statement by the judge when the jury in a criminal case was brought into court, after having been out some time, that, without intimating what the verdict should be, it seemed to him that it was a very plain case, and that he could not see why they should hesitate, was a comment on the evidence, within Const. art. 4, § 16, prohibiting comments on the evidence.

MOUNT, J.: Appellant was convicted of the crime of robbery. Upon this appeal he alleges

that the court erred in refusing a motion for a new trial upon the ground that the judge, when instructing the jury, commented upon the facts. After the evidence was all submitted, and the court had instructed the jury, and after the jury had retired to consider their verdict, and 18 hours had elapsed without a verdict, the jury was brought into the courtroom, where the following took place: "The Court: Gentlemen of the jury have you agreed upon a verdict in this case yet? Foreman of the jury: We have not, your honor. The Court: I do not want you to tell me whether you are for or against acquittal, but how do you stand in number? The Foreman: Eight to four, your honor. The Court: It seems to me, gentlemen of the jury, that you ought to agree on a verdict in this case. You twelve men know as much about this case as it is possible for any twelve men to know about it. Now, it is quit proper for each one to have his opinion, but it is your duty as jurors to reason together, and see if you cannot arrive at a verdict. Without in any way intimating what your verdict ought to be, because that is not my province, it does seem to me that this is a very plain case, and that you gentlemen ought to arrive at a verdict without any trouble whatever. I can't, for the life of me, see any reason why twelve men would hesitate at arriving at a verdict in this case. As I said before, I am not intimating what your verdict should be. That is for you. But you certainly ought to reach a verdict in this case. You may go back to your room again, gentlemen of the jury, and see if you can't arrive at a verdict." If there was no substantial evidence to go to the jury, it was the duty of the court to submit the case without comment upon the facts. Const. art. 4, § 16. In State v. Crotts, 22 Wash. 245, 60 Pac. Rep. 403, this court said: "There are different ways by which a judge may comment upon the testimony within the meaning of the constitution referred to above. The object of the constitutional provision doubtless is to prevent the jury from being influenced by knowledge conveyed to it by the court of what the court's opinion is on the testimony submitted. The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.* * * There is no other constitution that we have been able to find that is as prohibitive of the action of the court in this respect as ours. Most of them are to the effect that the judge will not charge the jury in respect to matters of fact. Ours, it will be noticed, goes beyond that, and provides that they shall not comment thereon." The remarks of the judge quoted above could mean but one thing to the jury, and that was that he believed the defendant was guilty. It is true, as argued by the prosecuting attorney, that the judge stated no fact. He even said, "Without in any way intimating what your verdict ought to be, because that is not my province." Yet he did intimate very plainly what his opinion was upon all the facts when he said: "It does seem to me that this is a very plain case, and that you gentlemen ought to arrive at a verdict without any trouble whatever. I can't for the life of me, see any reason why twelve men would hesitate at arriving at a verdict in this case." And then, protesting again that he was not intimating what the verdict should be, continued, "But you certainly ought to reach a verdict in this case." There can be no doubt that the judge meant that he believed the defendant guilty, and that the jury should so find. If he had stated to the jury, "Gentlemen, this defendant is guilty, but I am not stating what your verdict should be" it could not be reasonably contended that this was not error within the constitutional inhibition. While the judge protested that he was not intimating what the verdict should be, yet he did so intimate as clearly to the mind of any reasonable man as if he had stated it directly. In the following cases comments substantially like the one under consideration were held error viz.: People v. Kindleberger, 100 Cal. 367, 34 Pac. Rep. 852; State v. Ivanhoe, 35 Oreg. 159, 57 Pac. Rep. 317; State v. Fisher, 23 Mont. 540, 59 Pac. Rep. 919; State v. Chambers (Idaho), 75 Pac. Rep. 274.

For this error the judgment is reversed, and the cause remanded for a new trial.

Fullerton, C.J., and Hadley, Dunbar, and Anders, JJ., concur.

NOTE.—*Right of Trial Court to Comment Upon the Evidence.*—Judges being but men, it is impossible to expect that at times their interest in a case may not be more than that of the impartial jurist and that they will not become somewhat partisan in their view of the evidence, and, on rare occasions, attempt, by various means, to impose their views upon the jury. That such comments are always out of order, and sometimes fatal to the cause of a party in whose interest they are made, is well sustained by the authorities

The general rule is that, if remarks, made by a judge, during the progress of a trial, indicating his opinion of the weight of evidence introduced, are calculated to mislead the jury or prejudice the party, it is ground for reversal. Deshler v. Beers, 32 Ill. 368, 83 Am. Dec. 274; Singer v. Greenleaf, 100 Ala. 272 14 So. Rep. 109; Jessu 12 Ga. 261; Brinker v. Cummins, 133 Ind. 443, 32 N. E. Rep. 732; Atchison, etc., R. R. v. Ayers, 56 Kan. 176, 42 Pac. Rep. 722; Hewitt v. Railroad, 67 Mich. 61, 34 N. W. Rep. 659. Thus remarks by the court on the admission of a written document, that he thinks the paper is admissible in evidence to explain the testimony of a former witness, and goes to show he was probably mistaken, are improper. Smith v. Dunman, 9 Tex. Civ. App. 319, 29 S. W. Rep. 432. So also a justice's remark, on admitting a written conveyance of personalty in evidence before the jury in a claim case, that he thought the deed "worth but little," is ground for re-

versal. West v. Black, 65 Ga. 647. So also, in an action of replevin, it was held that, when the value of the goods was in issue and a dispute arose as to the correctness of an answer, as read by plaintiff's attorney, in a deposition in which affiant testified as to the value, it was reversible error for the court to remark: "Upon listening to the reading of the deposition, I have no doubt but that Mr. B., plaintiff's attorney, was present at the taking of the deposition, or that the answers had been written out by him or plaintiff's attorney." Shakman v. Potter, 98 Iowa, 61, 66 N. W. Rep. 1045.

This rule does not apply, however, where the fact commented upon is practically undisputed. Thus it was not error for the court to state that it appeared in evidence that defendant was not a poor man, where such was the undisputed fact, and defendant had testimony, in his own behalf, that he was probably worth about five and six thousand dollars. Olson v. Solverson, 71 Wis. 663, 32 N. W. Rep. 329; Blue v. McCabe, 5 Wash. 125, 31 Pac. Rep. 431; City Bank of Macon v. Kent, 57 Ga. 283; Conner v. Littlefield, 79 Tex. 76, 15 S. W. Rep. 217; Williams v. Crosby Lumber Co., 118 N. Car. 928, 24 S. E. Rep. 800; Deshler v. Beers, 32 Ill. 868. So, also, in the trial of a will contest, after the proponents had proven the execution of the will and the mental condition of the testatrix, they continued to offer other evidence, whereupon the court remarked, "What do you want with any more testimony?" The court held that the evidence of the execution being certain and uncontradicted, that the remark of the court was without prejudice to the contestant. Frezevant v. Raines (Tex. Sup.), 19 S. W. Rep. 567.

After a cause has been committed to a jury and a verdict returned, the observations of the judge on the question of acceptance of the verdict, which go to the weight of the evidence as well as to the points of law, will not furnish ground for a new trial. Russell v. Bradley, 4 Day (Conn.), 403. So, also, remarks of the trial judge, necessarily made in the hearing of the jury, in deciding a motion by counsel, are not error. Reinhart v. Miller, 22 Ga. 402, 58 Am. Dec. 506. So, also, in denying a dismissal or non suit, the magistrate may allege as his reason that certain evidence has been produced, which he will let the jury pass on, though the jury overhear him. Forors v. Johnson, 79 Ga. 553, 4 S. E. Rep. 925; Hartshorn v. Ives, 4 R. I. 471; Hall v. Aitkin, 25 Neb. 360, 41 N. W. Rep. 192. So, also, the remark of a trial judge that he felt compelled to exclude a certain deed as evidence of title, but regretted to do so, is not the subject of exception. Malloy v. Bruden, 86 N. Car. 251. So, also, where the court, in overruling an objection to a hypothetical question, remarked, "I think it is a fair epitome of the evidence already given in the case," it was not error, as expressing an opinion. Chicago, etc., R. R. v. Archer, 46 Neb. 907, 65 N. W. Rep. 1043. So, also, where, during the progress of a legal argument by counsel to the court, the court, to draw out the views of counsel, remarks that he does not see the use of certain evidence, such remark does not invade the province of the jury, though it may be in their hearing. Chattanooga, etc., R. R. v. Palmer, 89 Ga. 161, 15 S. E. Rep. 34. So, also, where the court, in ruling on certain evidence offered, makes a statement as to the theory of its admissibility and effect, but does not use any improper language, nor prejudice the case, nor criticise either the parties or witnesses, there is no error. Queen Ins. Co. v. Mfg. Co., 117 Ind. 416, 20 N. E. Rep. 299. See, also, to same effect, Snowden v. McKinney, 46 Ky. (7 B. Mon.) 258.

An interesting case is that of Harrison v. Harrison, 48 Kan. 443, 29 Pac. Rep. 572. In that case, during the progress of a trial to the court, the judge informed defendant, before he had introduced all his evidence, that the court was ready to decide the case without further evidence, and that he did not think additional testimony would affect the decision, but would hear anything of a different nature from that already offered. The evidence preponderated largely in favor of the defendant, but the decision of the court was against him. The Supreme Court of Kansas held that the remarks of the trial court had a tendency to mislead defendant into the belief that the decision would be in his favor and prevent him from having a fair and impartial trial, and that a new trial should be granted.

Another requisite necessary to constitute remarks by the trial court upon the evidence error is that they must be with prejudice to the contestant. Trezevant v. Raines (Tex.), 19 S. W. Rep. 567; Shelly v. Boland, 78 Ill. 438; Woolwine v. Bick, 39 Mo. App. 495; Burns v. Kirkpatrick, 91 Mich. 364. And the general rule in this class of cases is that the trial court may properly ask questions of witnesses on the stand or of counsel with a view to elicit the truth, but should not make remarks or comments on them or their testimony which may tend either to magnify or diminish, in the estimation of the jury, the importance or effect of such testimony, either as to credibility or value. See Hudson v. Hudson, 90 Ga. 581, 16 S. E. Rep. 349.

JETSAM AND FLOTSAM.

A correspondent at Perry, Iowa, sends us a copy of the following card which appeared as an advertisement on the cover of a telephone directory:

S. M. THORNLEY,
Justice of the Peace,
Notary Public,
Marriage Lisences
Procured and
Weddings
Solemnized.

Divorce Court Always
Open.

It is apparent that Mr. Thornley intends to encourage an entrance into the portals of matrimony by providing for a back door of escape. May the Lord have mercy on his soul for so foully deluding unsuspecting humanity.

DEAD DOG LEAVES A $10,000 ESTATE.

Judge Francis W. Downs, of Binghamton, N. Y., today made application for the appointment of an administrator for the estates of his dog Lee, which was run over by a fire engine and killed last week. Since his death, Lee has lain in state in a white casket, covered with flowers. The body will be put in a receiving vault and kept until spring, when it will be buried.

Judge Downs several years ago bought $20,000

worth of western mining stock, which for a long time was supposed to be worthless. About a year ago, it was announced that an assessment was to be made on this stock. In order to avoid paying the assessment, Judge Downs formally transferred his stock to Lee. The assessment was not made, however, and the mining stock soon began to appreciate in value until it is said to be worth $10,000.

Now Judge Downs wants to regain the stock, but the only way will be to have the estate of the dog settled up by an administrator. In as much as the dog died intestate, the question arises whether Judge Downs will be able to prove that he is next of kin to Lee, and legally entitled to the estate.

THE LAWYER'S LACHRYMAL RIGHTS.

Has a lawyer, in the course of his argument to the jury, the right to cry? Has he the right, *arguendo*, to give vent to "words that weep and tears that speak?"

The mere broaching of this proposition will doubtless fill the profession with righteous indignation, and the positive information that this sacred prerogative has been questioned, may perhaps create widespread alarm since a negative answer to the question propounded would be fraught with consequences most disastrous to the untrammeled practice of the law.

It will tend to quiet the professional alarm and at the same time appease the professional wrath, to know that lawyers in Tennessee, at least, have a judicial determination of the question recognizing and distinctly adjudicating the inviolable lachrymal rights of the lawyer.

In a well considered case, which came before the court upon an assignment of errors to the effect that "counsel for the plaintiff, in his closing argument, in the midst of a very eloquent and impassioned plea to the jury, shed tears and unduly excited the sympathies of the jury in favor of the plaintiff and greatly prejudiced them against the defendant," the Supreme Court of Tennessee, in an able opinion delivered by that erudite, discriminating jurist, Judge Wilkes, upheld the lawyer's constitutional right to cry before a jury.

In delivering the opinion Judge Wilkes used this pertinent language: "The conduct of counsel in presenting their cases to juries is a matter which must be left largely to the ethics of the profession and the discretion of the trial judge. Perhaps no two counsel observe the same rules in presenting their cases to the jury. Some deal wholly in logic and argument, without embellishments of any kind. Others use rhetoric and occasional flights of fancy and imagination. Others employ only noise and gesticulation, relying upon their earnestness and vehemence instead of logic and rhetoric. Others appeal to the sympathies, it may be the passions and peculiarities, of the jurors. Others combine all these, with variations and accompaniments of different kinds. No cast-iron rule can or should be laid down. Tears have always been considered legitimate arguments before a jury, and while the question has never arisen out of any such behavior in this court, we know of no rule or jurisdiction in the court below to check them. It would appear to be one of the natural rights of counsel, which no court or constitution could take away. It is certainly, if no more, a matter of the highest personal privilege. Indeed, if counsel has them at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they were indulged in to such excess as to impede or delay the business of the court. This must be left largely to the discretion of the trial judge, who has all the counsel and parties before him, and can see their demeanor, as well as the demeanor of the jury. In this case the trial judge was not asked to check the tears, and it was, we think, an eminently proper occasion for their use, and we cannot reverse for this."

The Tennessee lawyer, supported by this most righteous decision, therefore, may indulge freely his lachrymal rights, letting

> "The big round tears
> Course one another down his innocent nose
> In piteous chase,"

his lachrymal rights being limited only by the gentle restraint of the presiding judge that he must not indulge "to such excess as to impede or delay the business of the court." It is needless to say that the Tennessee courts, admitting foreign attorneys to practice before them, will make no invidious distinction between local and foreign counsel, and, with the limitations mentioned in the foregoing opinion, foreign attorneys, who exhibit to the court proper credentials, may

> "Drop tears as fast as Arabisn trees
> Their medicinal gum,"

without let or hindrance from the court.

It is but proper also to throw out the intimation that the Tennessee lawyer, practicing outside the limits of his state, expects, not only as a matter of courtesy and comity, but as a matter of absolute right, to be allowed to cry wherever he pleases. The *lex domicillii*, the personal capacity to cry, attaches to him wherever he goes, and even travels with him into foreign countries.

Jura lachrimosa personam sequuntur.

As counsel for appellants in the Tennessee case referred to availed themselves of the salutary rule which excuses the citing of authorities "when there are none known to counsel;" and while the court in delivering the opinion stated, that, after diligent search no authority could be found, there being no precedent, we may confidently rely upon this case as the leading case upon lachrymal rights; and, besides the guarantee of the constitution that the citizens of each state shall be entitled to all the privileges of the citizens of the several states, we feel that the decision is correct in principle, so sound, so broad and so universal in its application that counsel all over the land may confidently rely upon it, and, under its protection, may unrestrainedly exercise their constitutional rights and give way to the "melting mood" in the presence of the court and jury.

The right of the lawyer to cry before the jury is not only fundamental, but it is a prescriptive right, having existed from time immemorial whereof the memory of man runneth not to the contrary.

The demand for redress of all grievances at Runnymede contains no allusion to any encroachment upon the lawyer's lachrymal rights; and so the Petition of Right and the Bill of Rights are significantly silent as to the lawyer's right to cry, proving conclusively that lachrymal rights were universally recognized and were not even questioned by the most tyrannical of kings, and that, too, in the face of the fact that these rights were being constantly, openly and notoriously practiced by a profession which has never yet bee accused of a retiring modesty in the assertion and maintenance of its prerogatives.

Lachrymal rights are strictly personal. The law knows no such maxim as *qui lachrimat per alium lachrimat per se.* Every lawyer has the constitutional right to cry for himself, and the presence of the official court-crier does not curtail his unquestioned privilege of giving vent, if he so desires, to a veritable lachrymal storm.

While his Honor, Judge Wilkes, intimates that it is not only the right but the duty of the lawyer to cry before the jury when a proper occasion arises, we are concerned only in the maintenance of the inalienable right, leaving it to the sound discretion of counsel, as the exegencies arise, to cry just a wee bit, to drop a tear here and there or to bring on a perfect shower "blown up by the tempest of the soul," and pointing the jury to the distressing, heart-rending facts in the case, to exclaim: *Hinc illae lachrimae.—American Law Review.*

BOOK REVIEW.

YEAR BOOK OF LEGISLATION, VOL. 5.

The public generally, and especially the profession of the law, are indebted greatly to the New York State Libray, of which Hon. Melvil Dewey is director, for the wonderfully exhaustive and clearly arranged and systematic year books of legislation prepared under their auspices by Hon. Robert H. Whitten, Sociology Librarian. Volume V, which we have just received, is divided into three parts: First, Digest of Governors' Messages of 1903; second, Summary and index of Legislation of 1903; third, Review of Legislation of 1903. These parts are published during the year as three separate bulletins and then bound together, at the end of the year, to form what is known as the Year Book of Legislation. The Digest of Governors' Messages is a topical digest covering all the states and including related topics in the president's message. The Summary and Indexcf Legislation is a minutely classified summary or index of new laws passed by all the states, including votes on constitutional amendments and decisions declaring statutes unconstitutional. The Review of Legislation in part 3 contains contributions from specialists reviewing governors' recommendations and laws enacted on each important subject. These three closely related annual bulletins make up a year book of comparative legislation useful to legislators, public officers, journalists, investigators and all interested in keeping track of the movement of legislation in general, or on any special subject. We would advise the profession and public men generally to make generous use of these bulletins and thus encourage the publishers to continue the publication of the very valuable contributions to political science literature.

Published by the New York State Education Department, Albany, N. Y.

LOVELAND ON BANKRUPTCY.

Mr. Frank O. Loveland, Clerk of the United States Circut Court of Appeals for the sixth circuit, has had the most amazing and most immediate success of any law writer of the present time. His work is the work of a master mind, of a man experienced in all the practical details of his subject and of one who has the time at his disposal to write a good book. Equipped with these three transcending qualities it is little wonder that his books have been so well received by the profession and so confidently relied upon by the courts. Indeed his Forms of Federal Practice are about as little contested as they would be supposed to be if they had been enacted by congress itself and a lawyer feels absolutely safe in relying upon them.

What Mr. Loveland has already done for the profession in the matter of general federal practice he is doing for the profession in the matter of bankruptcy. Whenever Mr. Loveland speaks on any subject connected with federal law or practice he speaks with authority; so that when the first edition of his work on bankruptcy appeared it met with instant favorable reception from the members of the profession and has taken a very prominent place among the authorities on the very important subject of law.

The second edition of Mr. Loveland's work on bankruptcy has just appeared greatly enlarged and exhaustively citing the authorities. It is gratifying to observe that in making the present revision, Mr. Loveland has preserved the plan, adopted in the former edition, and which was so favorably commentep upon, to-wit: "To consider the power of congress upon the 'subject of bankruptcies' under the constition, the organization and jurisdiction of the courts of bankruptcy, and then to follow, step by step, in its natural course, a proceeding in bankruptcy, from its inception, through the court of bankruptcy and the appellate court." By this arrangement the several provisions relating to the same proceeding, which are separated in the act itself, are collected; so that the attorney may have before him all parts of the statute and the authorities relating to the particular question which is being investigated. We do not think we exaggerate when we say that Loveland on Bankruptcy is the most quickly accessible and most accurate authority on the subject of bankruptcy now published.

Printed in one volume of 1,422 pages and published by W. H. Anderson Co., Cincinnati, Ohio.

STREET RAILWAY REPORTS, VOL. 2.

Specialization still claims supreme attention as the order of the day in legal publications, and the success of reports of cases treating of special subjects warrants the assertion that this specialization is in response to a demand from the profession, and not the result of the genius and energy of some enthusiastic publisher. Our remarks in this connection are quite apropos to the recent appearance of the second volume of the series of reports known as the Street Railway Reports, annotated, edited by Frank B. Gilbert, of the Albany (N. Y.) bar. The first volume evidently had a successful sale, otherwise a second volume would hardly have appeared so promptly, as one can always judge of the success of a series of books by the promptness with which the successive volumes appear. The second volume of this work attempts to report all the important state and federal decisions on any subject of law in any way connected with operation of street railroads. The publisher calls our attention to the fact that Volume II. has 111 more pages than the preceding volume and reports in full twenty more cases. In addition to this, extracts are made from cases decided by lower courts of appellate and original jurisdiction. The notes in this volume are much more comprehensive than those contained in the previous volume and comprise about 150 pages of small type. A number of these notes are in the nature of treatises on the subjects considered. Nearly every case has appended to it a note either discussing a proposition indicated by the leading case, or referring to other similar cases reported in this and the preceding volume. Printed in one volume of 1070 pages and published by Matthew Bender, Albany, N. Y.

BOOKS RECEIVED

A Treatise on the Incorporation and Organization of Corporations Created under the "Business Corporation Acts" of the Several States and Territories of the United States, Including therein a Synopsis-Digest of the General Incorporation Acts of the Several Commonwealths, with Decisions Bearing Thereon; also Forms for Drawing Charters under the Laws of the Several States and Territories; General and Specific Object Clauses for Insertion in Charters; By-laws, Minutes, etc., etc. By Thomas Gold Frost, LL. D., Ph. D., of the New York Bar. Author of "Treatise on Guaranty Insurance," "The French Constitution of 1793," etc. Boston, Little, Brown and Company, 1905. Buckram, pp. 650. Price, $3.50. Review will follow.

Federal Statutes Annotated, Containing all the Laws of the United States of a General and Permanent Nature in Force on the first day of January, 1903. Compiled under the Editorial Supervision of William M. McKinney, Editor of the Encyclopedia of Pleading and Practice, and Peter Kemper, Jr. Vol. V. Edward Thompson Company, Northport, Long Island, New York, 1905. Sheep, pp. 1018. Price, $6.00. Review will follow.

A Treatise on the Law of Evidence, being a consideration of the nature and general principles of evidence, the instruments of evidence and the rules governing the production, delivery and use of evidence, together with incidental matters of practice, including also, under an alphabetical arrangement, the application of the rules and principles of evidence to particular actions, issues and parties in civil, criminal, equity and admiralty cases, together with evidence in court martial. By Byron K. Elliott and William F. Elliott, Authors of "Roads and Streets," "Railroads," "General Practice" and "Appellate Procedure." In four volumes. Volume I, General Principles. Volume II, Instruments of Evidence. Indianapolis, The Bobbs-Merrill Company, 1904. Sheep. Price, $6.00. Review will follow.

HUMOR OF THE LAW.

"Hellow, Slouchy, in any regular business now?" "Yep. I'm gittin' knocked over by automobiles and collectin' damages. Best graft I ever had.."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCORD AND SATISFACTION—Disputed Claims, Acceptance of Check.—Acceptance of check without objection held a complete accord and satisfaction of disputed claim.—Le Page v. Lalance & Grosjean Mfg. Co., 90 N. Y. Supp. 676.

2. ACCORD AND SATISFACTION—Joint Tort-Feasors — When injured party has received satisfaction from any joint tort-feasor, he is precluded from proceeding against any of the others.—Robertson v. Trammell, Tex., 83 S. W. Rep. 258.

3. ACCORD AND SATISFACTION—Satisfaction by One Joint Trespasser.—A person injured by joint trespassers, who received satisfaction from one of the wrongdoers, cannot maintain an action against the others.—Jones v. Chism, Ark., 83 S. W. Rep. 315.

4. ACCORD AND SATISFACTION — What Constitutes.—The acceptance by the creditor of a check from the debtor, written as "in full payment," with immediate notice to the debtor that action would be brought for the balance claimed, is not an accord and satisfaction. Harby v. Henes, 90 N. Y. Supp. 461.

5. ADMIRALTY—Wrongful Attachment of Vessel.—A libelant who proceeds *in rem* against a vessel in good faith and under advice of counsel, although unsuccessful in establishing a lien, is not liable in damages, because of his attachment of the vessel, beyond the taxable costs of the suit.—The Alcalde, U. S. D. C., D. Wash. 132 Fed. Rep. 576.

6. ANIMALS—Duty of Bailee.—A horseshoer, who beat a horse so that it died, held liable to its owner for its value.—Bissell v. York, Mo., 83. S. W. Rep. 282.

7. APPEAL AND ERROR — Amendment of Record. — Where plaintiffs excepted to dismissal on the ground that a judgment roll showed a former recovery, it was defendant's duty to incorporate the judgment roll in the case on appeal.—Muller v. Bendit, 90 N. Y. Supp. 433.

8. APPEAL AND ERROR—Boundaries, Nonsuit.—On appeal from a judgment of nonsuit, the testimony must be taken most favorably to plaintiff.—Smith v. Johnson, N. Car., 49 S. E. Rep. 62.

9. APPEAL AND ERROR—Estoppel, Objection to Instruction Embodying Principle Requested.—An appellant is estopped from urging an objection to an instruction, where similar instructions embodying the same principle were given by the court at his request.—Franks v. Matson, Ill., 71 N. E. Rep. 1011.

10. ARREST—Without Warrant, Legality.—A policeman cannot legally arrest one charged with a misdemeanor without a warrant, where the offense is not committed in his presence.—Percival v. Bailey, S. Car., 49 S. E. Rep. 7.

11. ASSAULT AND BATTERY—Punishment.—On conviction for assault and battery, the court may impose a fine, or imprisonment, or both, limited only by the constitutional inhibition against excessive fines or cruel and unusual punishment.—State v. McKain, W. Va., 49 S. E. Rep. 20.

12. ATTACHMENT—Interpleader.—The mere right of a simple contract creditor to have his debt satisfied can not be asserted by interpleading in an attachment suit May v. Disconto Gesellschaft, Ill., 71 N. E. Rep. 1001.

13. ATTORNEY AND CLIENT—Overcoming Defense by Proof of Fraud.—Plaintiff in an action at law to recover money held entitled to overcome the facts shown as a defense by showing they were induced by deceit.—Reilly v. Provost, 90 N. Y. Supp. 591.

14 ATTORNEY AND CLIENT—Right to Fees, Agreement. —Attorney of record held not entitled to fees from a party represented by him who had agreed to pay other counsel.—Radley v. Gaylor, 90 N. Y. Supp. 758.

15. BANKRUPTCY — Conditional Sales to Bankrupt.—

Property purchased by a retail dealer in Iowa for resale, under a contract reserving title and right of possession in the seller until payment, which agreement was void as against purchasers and creditors, under Code Iowa 1897, § 2905, for want of acknowledgment and recording, passed to the trustee in bankruptcy of the purchaser free from lien, under the provisions of Bankr. Act 1898.—*In re* Smith & Shuck, U. S. D. C., N. D. Iowa, 132 Fed. Rep. 301.

16. BANKRUPTCY — Equitable Assignment of Fund.—Drafts drawn by a bankrupt on his agent for the collection of rents, payable from such rents when collected, accepted by the drawee and discounted by a bank, held to operate as an equitable assignment of the rents *pro tanto*, and to constitute a lien on the same in the hands of the trustee, to whom they were paid; the bankruptcy having occurred before they were due or the drafts matured.—*In re* Oliver, U. S. D. C., N. D. Tex., 132 Fed. Rep. 588.

17. BANKRUPTCY—Manufacturing Corporations, Laundries.—A corporation conducting a laundry, the largest part of its business being the washing, starching, ironing and polishing of collars, cuffs, etc., for manufacturers, before they are put on the market, is engaged principally in manfacturing, and is subject to proceedings in involuntary bankruptcy.—*In re* Troy Steam Laundering Co., U. S. D. C., N. D. N. Y., 132 Fed. Rep. 266.

18 BANKRUPTCY—Partnership Debts.—A partner cannot bind the firm by notes given in the firm name in renewal of his individual notes, and the burden rests upon the creditor, seeking to prove the same against the partnership estate in bankruptcy, to show that the other partner or partners knew of the transaction and assented thereto.—*In re* McIntire, U. S. D. C., D. Mont., 132 Fed. Rep. 295.

19 BANKRUPTCY—Preference.—A creditor cannot be paid a dividend from a bankrupt estate, where it appears after the filing of his claim that he had received a preference which he retains.—*In re* Privett, U. S. D. C., N. D. Tex., 132 Fed. Rep. 592.

20. BANKRUPTCY—Property Passing to Trustee.—Under the law of Vermont a chattel mortgage is good as to after-acquired property of which the mortgagee has taken possession, and a transfer of the same to him by the mortgagor within four months prior to his bankruptcy does not create an unlawful preference, but the trustee takes the right of redemption only.—*In re* Rogers & Woodward, U. S. D. C., D. Ver., 132 Fed. Rep. 560.

21. BANKRUPTCY—Provable Debts, Wife's Earnings in Husband's Employ.—Neither the common law nor the Wisconsin statute (Rev. St. 1898, § 2343) entitles a wife to prove against the estate of her husband in bankruptcy as against creditors a claim for wages earned by her while employed by him in his business.—*In re* Winkels, U. S. D. C., W. D. Wis., 132 Fed. Rep. 590.

22. BANKRUPTCY—Right of Depositor to Set Off.—On the bankruptcy of a banking partnership, a depositor having a credit balance in his account is entitled to set off the same against a note on which he is indebted to the bank.—*In re* Shults, U. S. D. C., W. D. N. Y., 132 Fed. Rep. 573.

23. BANKRUPTCY — Saloon License Certificates. — A bank to which a brewery company, prior to its bankruptcy, had pledged saloon license certificates, to pay for which it had advanced the money to customers, taking an assignment of the certificates as security, held entitled to the amount of collections made by the receiver and trustee in bankruptcy from the several licensees.—*In re* Elm Brewing Co., U. S. D. C., E. D. N. Y., 132 Fed. Rep. 299.

24. BANKRUPTCY—Surety Debts.—Creditors who have proved claims against the estate of a bankrupt on which he was liable as surety or indorser, and which are also secured by collateral, will be required to exhaust the collateral before receiving dividends, and are entitled to dividends only on the balance due after the proceeds of the collateral have been credited.—*In re* Matthews, U. S. D. C., E. D. N. Car., 132 Fed. Rep. 274.

25. BENEFIT SOCIETIES—Accident Insurance.—An insurance certificate, providing for an indemnity in case of a broken leg, held not to cover a "Pott's fracture."—Peterson v. Modern Brotherhood of America, Iowa, 101 N. W. Rep. 289.

26. BILLS AND NOTES—Indorsement, Consideration.—A valid consideration is necessary to support the liability of an indorser of a negotiable note.—Peabody v. Munson, Ill., 71 N. E. Rep. 1006.

27. BOUNDARIES — Establishment by Processioners.—Where the superior court had no jurisdiction of a proceeding establishing a boundary between adjoining lands by processioners, the direction of a verdict was erroneous.—Walker v. Boyer, Ga., 48 S. E. Rep. 916.

28. BRIDGES—Guard Rails —A highway commissioner held not guilty of negligence in failing to provide a nine-foot bridge with guard rails.—Mack v Town of Shawangunk, 90 N. Y. Supp. 760.

29. BROKERS—Action for Commissions, Defective Complaint.—Complaint in an action for brokers' commissions under a contract held insufficient; it not showing the purchaser was ready to take title, and the acts of defendants preventing the passing of title.—Davis v. Silverman, 90 N. Y. Supp. 589.

30. BUILDING AND LOAN ASSOCIATIONS — Amending Articles, Effect on Existing Loans.—A contract of a loan association with its agent for compensation is not affected by a subsequent by-law abolishing a fund from which such compensation was to be paid.—Rollins v. Co operative Bldg. Bank, 90 N. Y. Supp. 631.

31. CARRIERS—Authority of Agent.—An agent of a railway company held to have authority to contract to receive such freight when deposited along the line to await the arrival of the cars.—Georgia S. & F. Ry. Co. v. Marchman, Ga., 48 S. E. Rep. 961.

32. CARRIERS — Death of Brakeman. — In an action against a railway company for the death of a brakeman, an instruction submitting to the jury the question of defendant's negligence in failing to signal the approach of an overhead bridge held proper.—Hedrick v. Southern Ry. Co., N. Car., 48 S. E. Rep. 830.

33 CARRIERS—Delay in Delivery.—A shipper of live stock held not entitled to recover damages for delay in delivery, where delivery was made immediately on the carrier's ascertaining the authority of the persons demanding delivery.—Moore v. Baltimore & O. R. Co., Va., 48 S. E. Rep. 887.

34. CARRIERS—Failure to Furnish Proper Car for Live Stock.—A shipper cannot recover for damages to the shipment because of the carrier's failure to furnish a proper car, where that ground of negligence is not alleged in the declaration.—Moore v. Baltimore & O. R. Co., Va., 48 S. E. Rep. 887.

35. CHATTEL MORTGAGES—Extending Time of Payment.—The promise of a chattel mortgagee to extend the time of payment of the mortgage debt actually due, based on the promise of the mortgagor to pay the sum with interest on a later date, is without consideration.—Repelow v. Walsh, 90 N. Y. Supp. 651.

36. CONSTITUTIONAL LAW — Contempt, Libel After Termination of Cause.—The power of a court to punish one for contempt, consisting of a libelous article published in a newspaper, is no invasion of the liberty of the press.—Burdett v. Commonwealth, Va., 48 S. E. Rep. 878.

37. CONSTITUTIONAL LAW — Interference of Court with Site of Monument.—Where the legislature, with the consent of a city, has provided for the erection of a monument in a certain square, the court cannot interfere on the ground that that square is not the proper place for the monument.—Locke v. City of Buffalo, 90 N. Y. Supp. 550.

38. CONSTITUTIONAL LAW—Limitations, Judgments of Other States.—A law of a state which unreasonably reduces the time for bringing an action in its courts on a judgment of another state based on a pre-existing contract is unconstitutional as impairing the obligation of

the contract.—Lamb v. Powder River Live Stock Co., U. S. C. C. of App., Eighth Circuit, 132 Fed. Rep. 484.

39. CONSTITUTIONAL LAW — Regulation of Trial, Preferred Cases.—Code Civ. Proc. § 793, as amended by Laws 1904, p. 311, ch. 173, held unconstitutional, as depriving the judiciary of discretion to regulate the hearing of preferred causes.—Riglander v. Star Co., 90 N. Y. Supp. 772.

40. CONSTITUTIONAL LAW — Royal Grants, Impairment of Obligations.—Under Const. art. 1, § 17, a grant of land made by the king of Great Britain, before October 14, 1775, is a contract, the obligation of which cannot be impaired by the state.—Trustees of Town of Brookhaven v. Smith, 90 N. Y. Supp. 646.

41. CONTEMPT—Deserting Case in Midst of Trial.—An attorney held properly fined for contempt of court, where, on his being unable to coerce the court to modify a ruling, he immediately deserted the case in the midst of a trial before a jury.—People v. Newberger, 90 N. Y. Supp. 740.

42. CONTRACTS — Consideration.—A contract for permission to publish author's work held not without consideration, by reason of a prior conditional contract between the author and another.—Barry v. Smart Set Pub. Co., 90 N. Y. Supp. 455.

43. CONTRACTS—Modifying Common Law Liability.—Contracts breaking down common-law liability and relieving persons from penalties for negligence should not be given an enforcement beyond that demanded by their strict construction.—Johnson v. Fargo, 90 N. Y. Supp. 725.

44. CONTRACTS — Mutuality.—A contract to manufacture for defendant such jelly pails as he "wanted," but which defendant neither contracted to buy or want held void for want of mutuality.—Higbie v. Rust, Ill., 71 N. E. Rep. 1010.

45. CORPORATIONS—Bank, Stockholder's Liability. — Where a creditor of a bank applied to share in the proceeds of an action to enforce a stockholder's statutory liability, she was properly charged with a proportionate amount of the expenses of such litigation.—*In re* Ziegler, 90 N. Y. Supp. 681.

46. CORPORATIONS—Estoppel, Want of Legal Existence.—One selling chose in action to a purported corporation held estopped to assert a want of legal existence, as against a *bona fide* transferee of such corporation in a suit to recover the property.—Green v. Grigg, 90 N. Y. Supp. 565.

47. CORPORATIONS—Foreign Judgments.—Where foreign judgments sued on did not show that court had jurisdiction of the person, evidence *aliunde* was not admissible to show such fact.—Johnston v. Mutual Reserve Life Ins. Co., 90 N. Y. Supp. 539.

48. CORPORATIONS — Suit by Stockholder to Compel Dividend. — A stockholder cannot maintain a suit in equity against the corporation and its directors to compel the declaration of a dividend, where it is not shown that he had made application therefor to the directors, or that such an application would not be given proper consideration.—Maeder v. Buffalo Bill's Wild West Co., U. S. C. C., D. N. J., 132 Fed. Rep. 280.

49. COSTS—Discretion of Court. — In a suit by three judgment creditors to set aside fraudulent conveyances, held not an abuse of discretion to require defendants to pay all the costs arising, though two plaintiffs were denied relief.—Scott v. Aultman Co., Ill., 71 N. E. Rep. 1112.

50. COSTS—Extra Allowance.—The court held not authorized to award an extra allowance in a negligence case of a very common type.—Leonard v. Union Ry. Co., 90 N. Y. Supp. 574.

51. CRIMINAL LAW — Assignments of Error.—When a designated portion of a charge contains several distinct propositions, one or more of which is correct, general assignment of error is without merit.—Miller v. State, Ga., 48 S. E. Rep. 904.

52. CRIMINAL LAW—Instructions, Theory of Defense.—The judge is not bound in his charge to notice a theory of defense not raised by the evidence, unless a request in writing is submitted.—Collins v. State, Ga., 48 S. E. Rep. 903.

53. CRIMINAL TRIAL—Change of Venue.—Where a motion for change of venue was denied after hearing evidence, and no exception was taken, the same contention cannot be urged as a ground for a new trial.—Williford v. State, Ga., 48 S. E. Rep. 962.

54. CRIMINAL TRIAL—Habeas Corpus.—One who, without objection, goes to trial before a judge who receives compensation from fines imposed on those convicted, cannot, after conviction, on petition for *habeas corpus*, urge that the act establishing the court is void.—Hightower v. Hollis, Ga., 48 S. E. Rep. 969.

55. CRIMINAL TRIAL—Homicide, Absence of Judge.—The conduct of trial judge, in prosecution for homicide, in absenting himself from the courtroom and leaving his daughter in charge, held error.—Goodman v. State, Tex., 83 S. W. Rep. 196.

56. CRIMINAL TRIAL—Instruction, Use of Words "Per Se."—The use of the words "*per se*" in an instruction in a criminal case held not objectionable as calculated to mislead the jury.—Schwartz v. State, Tex., 83 S. W. Rep. 195.

57. CRIMINAL TRIAL — Intoxicating Liquors, Instructing Jury.—The court may group the constituent elements of an offense, and instruct that if these are proven beyond a reasonable doubt they should convict.—Bradley v. State, Ga., 48 S. E. Rep. 981.

58. CRIMINAL TRIAL—Public Officers, Judicial Notice.—The supreme court is judicial notice of who are the public officers of the state, when commissioned by the governor.—Abrams v. State, Ga., 48 S. E. Rep. 965.

59. CRIMINAL TRIAL — Separation of Jurors.—Permitting strangers to sleep in the room where the jury trying a homicide case was sleeping, held not ground for reversal of a conviction, no conversation having taken place.—Jones v. State, Tex., 83 S. W. Rep. 198.

60. CRIMINAL TRIAL—Venue of Crime.—Proof that a crime was committed in the city of Atlanta is not sufficient to establish beyond a reasonable doubt that it was committed in Fulton county, Ga.—Murphy v. State, Ga., S. E. Rep. 909.

61. CRIMINAL TRIAL—Weight of Evidence.—Where the jury are instructed that the evidence must satisfy them beyond a reasonable doubt of the guilt of the accused, a new trial will not be granted because the court charged that, in determining the credibility of the witnesses, the jury might consider the number.—Dickerson v. State, Ga., 48 S. E. Rep. 942.

62. CRIMINAL TRIAL—When Jointly Indicted, Instructions.—Where two persons are jointly indicted for the same offense, the jury should be instructed that, though one was found guilty, the other might be acquitted.—Abrams v. State, Ga., 48 S. E. Rep. 965.

63. DAMAGES—Agreement to Keep Part of Machinery on Hand.—The measure of damages for breach of provision in a contract of sale of a machine to keep parts on hand for repairs held to be loss of profits during the time of delay in furnishing parts for repairs.—Janney Mfg. Co. v. Banta, Ky., 83 S. W. Rep. 130.

64. DAMAGES — Loss During Minority.—In an action for injuries to a minor, an instruction on the question of damages held objectionable as authorizing a recovery for diminished earning capacity during minority.—Gulf, C. & S. F. Ry. Co. v. Grisom, Tex., 82 S. W. Rep. 671.

65. DAMAGES—Personal Injuries, Scope of Complaint.—The allegation in the complaint of "injuries to the head" is broad enough to admit evidence that the injury received caused pressure on and injury to the brain.—Fleming v. Tuttle, 90 N. Y. Supp. 661.

66. DIVORCE — Alimony, Payments After Husband's Death.—The court may, in decree of divorce, direct the payment of alimony so long as the wife shall live, and require security therefor.—Wilson v. Hinman, 90 N. Y. Supp. 746.

67. DIVORCE—Appearance, Personal Service.—Appearance by an attorney under written direction of the defendant in divorce gave jurisdiction, though defendant had not been personally served.—Dodge v. Dodge, 90 N. Y. Supp. 488.

68. EMINENT DOMAIN — Railroads, Parallel Lines.—A railroad company cannot condemn longitudinally the right of way of another railroad company of the width of 100 feet, authorized by the statute, but may condemn a strip adjoining.—Chicago & M. Electric R. Co. v. Chicago & N. W. Ry. Co., Ill., 71 N. E. Rep. 1017.

69. EQUITY — Estoppel, Asserting Title Against Purchaser.—Where an owner of land induces another to buy it as the property of a third person, he will be estopped from asserting title as against purchaser.—Brice v. Sheffield, Ga., 48 S. E. Rep. 925.

70. ESTOPPEL—Deed as Mortgage.—Where none of the parties in interest had changed his position to his prejudice by an alleged assumption of the mortgage in the deed, the grantee was not estopped to deny liability on such assumption.—Merriman v. Schmitt, Ill., 71 N. E. Rep. 986.

71. EVIDENCE—Minutes, City Clerk.—An extract from the minutes of a city, certified by a person described as "clerk of council," held admissible over an objection that it is not certified by the clerk of "the mayor and council" of the city.—Anderson v. Blair, Ga., 48 S. E. Rep. 951.

72. EVIDENCE—Nonexpert Opinions as to Unsoundness of Mind.—Nonexpert witnesses having first detailed instances tending to show a diseased mind, occurring after the accident, held entitled to give their opinion as to plaintiff's unsoundness of mind —Chicago Union Traction Co. v. Lawrence, Ill., 71 N. E. Rep. 1024.

73. EVIDENCE—Written Lease, Prior Parol Agreement. —Where a written lease binds the tenant to repair plumbing, he cannot show a prior oral agreement whereby the landlord agreed to put the premises in perfect condition.—Thomas v. Dingelman, 90 N. Y. Supp. 436.

74. EXECUTORS AND ADMINISTRATORS—Claims, Duty to Invoke Limitations.—An executor should assert the defense of limitations against claims presented —*In re* Goss, 90 N. Y. Supp. 769.

75. EXECUTORS AND ADMINISTRATORS—Foreign Administrators.—Before a foreign administrator can sue, it must appear that his intestate at his death was domiciled in the state where the letters were granted, and that no administration has been granted in the state where the suit is brought —Taylor v. McKee, Ga., 48 S. E. Rep. 943.

76. EXECUTORS AND ADMINISTRATORS—Specific Performance.—Specific performance of contract for sale of real estate held not enforceable against vendee entering into contract without knowledge of restrictive agreement imposed as a servitude on the land.—Scudder v. Watt, 90 N. Y. Supp. 605.

77. FIRE INSURANCE — Threatened Fire, Removal of Goods.—In an action on a policy for loss in preparing to remove the goods, where there was immediate danger of fire, it was for the jury to determine whether the means resorted to were reasonable.—Insurance Co. of North America v. Leader, Ga., 48 S. E. Rep. 972.

78. FRAUDS, STATUTE OF—Parol Contract for Opening Mine.—A parol contract for opening a coal mine, which plaintiff might have performed within one year, but for a breach thereof by defendant, is not within the statute of frauds.—Degman v. Nowling, Ind. Ter., 82 S. W. Rep. 758.

79. FRAUDULENT CONVEYANCES—Suits to Set Aside.—A sale of land under a judgment in an attachment suit held not a satisfaction of a judgment held by the purchaser, who refused to perfect the purchase.—Scott v. Aultman Co., Ill., 71 N. E. Rep. 1112.

80. FRAUDULENT CONVEYANCES—Trusts in Favor of Wife.—If a trust in favor of a wife against the husband's creditors can be established by parol, the testimony should be clear and convincing.—Kline v. Kline's Creditors, Va., 48 S. E. Rep. 882.

81. GAMING—Recovery of Money Bet.—Demand for the return of money wagered held not a prerequisite to an action to recover the same, under 1 Rev. St., p. 662, §§ 8, 9 —Mendoza v. Levy, 90 N. Y. Supp. 748.

82 HABEAS CORPUS—Custody of Children.—A judgment of a court or judge of competent jurisdiction, unappealed from, in a *habeas corpus* proceeding to obtain custody of a child, held *res judicata* as between the parties so long as the same conditions exist.—Cormack v. Marshall, Ill., 71 N. E. Rep. 1077.

83. HIGHWAYS—Ownership of Fee.—It is presumed that the fee of a road opened under the English common law remained in the former owner of the property, the public acquiring a mere easement.—Mott v. Eno, 90 N. Y. Supp. 608.

84. HOMICIDE—Presumption that Record is Complete. —It is presumed that the record made up by the clerk is full and complete, and that he fully peformed his duty in that regard, until the contrary is made to appear.—Gardner v. United States, Ind. Ter., 82 S. W. Rep. 704.

85. INDICTMENT AND INFORMATION—Misnomer.—Where a woman with whom accused is charged to have lived in fornication is known indifferently by two names, the conviction will not be set aside on the ground that her name in the indictment was not her real name —Whittington v. State, Ga., 48 S. E. Rep. 948.

86. INJUNCTION—Controlling Factor in Doubtful Case. —The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt on application for preliminary injunction.—Harriman v. Northern Securites Co., U. S. C. C., D. N. J., 132 Fed. Rep. 464.

87. INJUNCTION — Political Conventions. — Courts of chancery cannot regulate by injunction a mere right to office, or to the nomination to an office, or the acts of public officers in the discharge of official duties.—People v. Rose, Ill., 71 N. E. Rep 1124.

88. INJUNCTION—Velocepede, Use of Railroad Track.— A railroad company held to have no adequate remedy at law to prevent a trespasser from using its track on which to operate a railroad velocepede, and hence was entitled to an injunction to restrain such use.—Gulf, C. & S. F. Ry. Co. v. Puckett, Tex., 82 S. W. Rep. 662.

89. INTERPLEADER—Parties Occupy Position of Plaintiff —Where parties interplead, each occupies a position of plaintiff in possessory action, and must recover on the strength of his own title.—Conway v. Caswell, Ga., 48 S. E. Rep. 956.

90. INTERPLEADER—Sufficiency of Bill.—A bill in the nature of a bill of interpleader and a bill of interpleader are governed by the same general principles.—Stephenson & Coon v. Burdett, W. Va., 48 S. E. Rep. 846.

91. INTOXICATING LIQUORS — City Ordinance. — The mayor and council of Americus held authorized to prohibit by ordinance the having and keeping for unlawful purposes of intoxicating liquors.—Robinson v. City of Americus, Ga., 48 S. E. Rep. 924.

92. INTOXICATING LIQUORS—Sale Without Payment of Tax.—One cannot be convicted of selling intoxicating liquor without having paid the occupation tax, without proof that such a tax was imposed.—Scott v. State, Tex., 82 S. W. Rep. 656.

93. INTOXICATING LIQUORS—Signatures, Park Commissioner.—Under Act Feb. 24, 1869, as amended April 26, 1869, held, that where South Park, in the city of Chicago, fronted on one of the four streets surrounding a block in which it was proposed to keep a saloon, the park commissioners had authority to sign for such frontage on an application for a license.—Theurer v. People, Ill., 71 N. E. Rep. 997.

94. JUDGES—Favoritism, Removal.—Certain acts of favoritism by a justice of the municipal court toward certain attorneys held cause for removal of the justice

though such favoritism was not the result of bribery.—*In re* Bolte, 90 N. Y. Supp. 499.

95. JUDGMENTS — Conclusiveness. Where Regularly Entered.—A judgment regularly entered, in the absence of fraud or collusion, is conclusive as to the debt and its amount an action to try title by the judgment creditor against an alleged fraudulent grantee.—Salemonson v. Thompson, N. Dak., 101 N. W. Rep. 820.

96. JUDGMENT—Cost Bills.—A judgment in a suit to vacate a master's sale of a life tenant's interest in certain real real estate held not *res judicata* of the remaindermen's right to the vacation of a sale of their interest for the payment of certain cost bills.—Henderson v. Kibbie, Ill., 71 N. E. Rep. 1091.

97. JUDGMENT— Ejectment, Res Judicata. — The determinatio nin a suit to enjoin an action of ejectment held *res judicata* in the ejectment action on the question of defendant's equitable title. — Rausch v. Briefer, Mich., 101 N. W. Rep. 523.

98. JUDGMENT—Equity Jurisdiction.—Proper remedy to vacate default judgment, after overruling of motion for such purpose, is by appeal from the order overruling the motion, and not by suit in equity.—Stewart v. Snow, Ind. Ter., 82 S. W. Rep. 696.

99. JUDGMENT—Practice.—Defendant who has a claim constituting a defense and an affirmative cause of action against plaintiff, can use it for defense or for attack but not for both.—Brown v. First Nat. Bank, U. S. C. C. of App., Eighth Circuit, 132 Fed. Rep. 450.

100. JUDGMENT—Res Judicata, Effect of Ruling to Dissolve Attachment.—A ruling on a motion to dissolve an attachment is not *res judicata* as against one who, though a party at the time of the ruling, is dismissed therefrom by the final judgment.—Fred Krug Brewing Co. v. Healey, Neb., 101 N. W. Rep. 329.

101. JURY—Where Juror Had Formerly Been Attorney's Client.—A juror is nor disqualified because he had been a client of one of the attorneys in the case, which relation had terminated.—Brown v. McNair, Ind. Ter., 82 S. W. Rep. 677.

102. JUSTICE OF THE PEACE — Appeal, Certiorari.—Where an appeal is entered in a justice court, and certiorari sued out, the superior court should not dismiss the writ, unless invalidity of appeal affirmatively appears.—J. G. Puett & Co. v. Mc Call & Co., Ga., 48 S. E Rep. 960.

103. LANDLORD AND TENANT — Dangerous Porch, Licensee.—Plaintiff held not entitled to recover for injuries received, owing to defective condition of a porch, in the use of which she was a mere licensee.—Flaherty v. Nieman, Iowa, 101 N. W. Rep. 280.

104. LANDLORD AND TENANT—Lease on Shares.—In an action by a landowner to recover possession of the cropper's share of grain, where there was evidence that plaintiff sent a person, who took away his share, the question of such person's authority was for the jury.—Graves v. Walter, Minn., 101 N. W. Rep. 297.

105. LANDLORD AND TENANT—Personal Injuries, Defective Drain in Tenement Yard.—A tenant, injured by a defective drain maintained by the landlord in a common backyard, held not guilty of contributory negligence as a matter of law.—Garrett v. Somerville, 90 N. Y. Supp. 705.

106. LANDLORD AND TENANT—Recovery of Possession Summary Proceeding.—A landlord held not entitled to maintain summary proceedings, where tenancy had not been terminated by notice or limitation.—Gossett v. Fox, 90 N. Y. Supp. 477.

107. LARCENY—Indictment, Description of Property.—To sustain a conviction of larceny, the evidence must make out the description of the stolen property laid in the indictment.—McLendon v. State, Ga., 48 S. E. Rep. 902.

108. LIFE INSURANCE—Premiums, Duty to Tender.—Where insurer erroneously refused a tender of premiums on the ground that the policy had lapsed, insured was absolved from liability to tender subsequent premiums, which might be deducted from a recovery on the policies.—Doney v. Prudential Ins. Co., 90 N. Y. Supp. 757.

109. LIMITATION OF ACTIONS—Admission of Debt.—An acknowledgment of the debt by defendant at the trial held not to preclude the defense of limitations.—Kahrs v. City of New York, 90 N. Y. Supp. 793.

110. MALICIOUS PROSECUTION — Probable Cause. — Where in an action for malicious prosecution, the jury were charged that plaintiff could not recover if probable cause existed, instructions that defendant's malice was immaterial, if probable cause existed, were properly refused.—Rulison v. Collins, Ind. Ter., 82 S. W. Rep. 748.

111. MASTER AND SERVANT — Admission of Superintendent's Testimony. — In an action for injuries to plaintiff while working for defendants' "steel gang" at a stone quarry, held, that refusal to allow defendants' superintendent to answer certain questions was error.—Lane Bros. & Co. v Bauserman, Va., 48 S. E. Rep. 857.

112. MASTER AND SERVANT—Assumed Risk, Injuries in Mine — A servant employed in hauling cars loaded with coal in a mine, who relied on an assurance given by a fellow servant, held to assume the risk —Collingwood v. Illinois & I. Fuel Co., Iowa, 101 N. W. Rep. 283.

113. MASTER AND SERVANT — Contracts Releasing Liability. — Contract whereby employee released employer from liability for injuries which should be sustained by the employer's negligence or otherwise held contrary to public policy and invalid. — Johnson v. Fargo, 90 N. Y. Supp. 725.

114. MASTER AND SERVANT—Fellow Servants.—Act of a brewery foreman in setting certain machinery in motion, whereby another employee was injured, held that of a fellow servant.—Baier v. Selke, Ill., 71 N. E. Rep. 1074.

115. MASTER AND SERVANT — Liability of Master for Foreman's Negligence.—A master held to be liable for injuries to a servant resulting from the negligence of the master's yard foreman.—Fleming v. Tuttle, 90 N. Y. Supp. 661.

116. MINES AND MINERALS — Custom and Usages. — Custom or usage in mining districts, allowing a prospector to remain on another's premises and work out the prospect of ore against the will of the owner, held opposed to the statute of frauds.—Entwhistle v. Henke, Ill., 71 N. E. Rep. 990.

117. MORTGAGES—Conveyance, Subject to Mortgage.—Where a mortgagor conveyed the land to another, who assumed and agreed to pay the mortgage, the mortgagor's liability became that of a surety only.—Germania Life Ins. Co. v. Casey, 90 N. Y. Supp. 418.

118. MORTGAGES—Creditor's Suit.—In an action by a creditor to enforce the sale of property mortgaged to a third person for the benefit of all the creditors of the mortgagor, all parties interested are proper parties defendant.—First State Bank v. Sibley County Bank, Minn. 101 N. W. Rep. 309.

119. MORTGAGES—Right to Incumber Property Conveyed.—In the absence of a special authority, a grantor has no power to incumber real estate, after the execution and delivery of a deed.—Ewers v. Smith, 90 N. Y. Supp. 575.

120. MUNICIPAL CORPORATIONS—Highways, Ownership of Fee.—Possession by the public of a street does not give it title to the fee in the street by adverse possession, where it makes no claim to ownership of the fee adverse to that of the true proprietor.—Mott v. Eno, 90 N. Y. Supp. 608.

121. MUNICIPAL CORPORATIONS—Overflowing Sewer, Continuous Damage. — Where a city is liable to one whose property has been injured by the overflowing of a sewer, the damages are the depreciation in rental value. —Ahrens v. City of Rochester, 90 N. Y. Supp. 744.

122. MUNICIPAL CORPORATIONS—Police Officers, Fail-

ure to Execute Warrant.—A police officer failing to execute a warrant held not entitled to show as a defense that the magistrate issuing it orally requested him not to serve it.—People v. McAdoo, 90 N. Y. Supp. 669.

123. MUNICIPAL CORPORATIONS — Surface Waters, Change of Street Grade.—Municipal corporation held liable to an adjoining owner for injuries by the flooding of his premises by water collected from a catch basin in the street.—Miles v. City of Brooklyn, 90 N. Y. Supp. 702.

124. MUNICIPAL CORPORATIONS — Violation of Ordinance.—A proceeding for violation of an ordinance of an incorporated town held civil in its nature, and defendant must file the statutory affidavit as a prerequisite to an appeal.—Fortune v. Incorporated Town of Wilburton, Ind. Ter., 82 S. W. Rep. 738.

125. NEGLIGENCE—Overhead Bridge, Track Crossing.—Under the statute of Virginia the mere knowledge of a brakeman of an overhead bridge crossing the track held not a bar to a recovery for his death by being struck by a bridge there.—Hedrick v. Southern Ry. Co., N. Car., 48 S. E. Rep. 830.

126. NEGLIGENCE—Vicarious Negligence.—The right of one to recover for injuries caused by the negligence of a street car company is dependent on the exercise of due care by his companion, who is driving.—Evensen v. Lexington & B. St. Ry. Co., Mass., 72 N. E. Rep. 355.

127. PLEDGES—Life Insurance.—Pledge of life policy as security for debt is valid.—Gordon v. Ware Nat. Bank, U. S. C. C. of App., Eighth Circuit, 132 Fed. Rep. 444.

128. PLEADING—Variance.—An objection to evidence as a material variance is of no avail, unless it is shown that the variance misled the objecting party to his prejudice.—Halloran v. Holmes, N. Dak., 101 N. W. Rep. 810.

129 PRINCIPAL AND SURETY—Wrongful Surrender by Pledgee. — Wrongful surrender of collaterals by a creditor without the knowledge of sureties discharges them from liability according to the value of the securities surrendered.—Brown v. First Nat. Bank, U. S. C. C. of App., Eighth Circuit, 132 Fed. Rep. 450.

130. PROHIBITION—Election Precincts.—The establishment of election precincts and voting places by the county court is not judicial, and cannot be controlled by prohibition.—Williamson v. Mingo County Court, W. Va., 48 S. E. Rep. 835.

131. QUIETING TITLE—Pleading and Proof.—In an action to establish ownership of land, which the complaint alleges defendant holds as security for a debt, proof that defendant's apparent title is a passive trust held not a variance.—Holloran v. Holmes, N. Dak., 101 N. W. Rep. 310.

132 RAILROADS—Injury to Adjoining Property.—A railroad company held liable for injuries to adjoining property by timber negligently left on its right of way, which was floated onto such property by high water — Illinois Cent. R. Co. v. Moore, Ky., 82 S. W. Rep. 624.

133. RAILROADS—Killing Stock on Track.—Where there is no public crossing, and the railroad company is not bound to anticipate stock on the track, it is not negligence to run trains at 50 or 60 miles an hour.—Central of Georgia Ry. Co. v. Williams Buggy Co., Ga., 48 S. E. Rep. 989.

134. RECEIVERS—Notice of Final Report.—A notice of the filing of a receiver's final report and of the hearing thereon is insufficient, if not directed to any one or signed by any one.—Williams v. Des Moines Loan & Trust Co., Iowa, 101 N. W. Rep. 277.

135. REMOVAL OF CAUSES—Suit by Stockholder.—Equity rule 94, as to the requisites of a bill by a stockholder founded on rights of the corporation, cannot be applied to a bill filed in a state court and from thence removed into a federal court.—Maeder v. Buffalo Bill's Wild West Co., U. S. C. C., D. N. J., 132 Fed. Rep. 280.

136. RESCUE — What Constitutes Offense.—It is not a penal offense to liberate one from unlawful custody.—Adams v. State, Ga., 48 S. E. Rep. 910.

137. SALES—Acceptance of Offer to Sell.—A contract amounting only to an offer to sell cannot be the foundation of an action until accepted.—Huggins v. Southeastern Lime & Cement Co., Ga., 48 S. E. Rep. 933.

138. SALES—Part Performance.—Where a seller of hogs delivers a less quantity than he contracted to sell, and the buyer accepts them, he must pay the reasonable value, subject to any damages sustained.—Mead v. Rat Portage Lumber Co., Minn., 101 N. W. Rep. 299.

139. SET-OFF AND COUNTERCLAIM—Libel, Where Published as a Delinquent.—Where a dealer in fruits caused plaintiff's name to be published as a delinquent debtor, and plaintiff brought libel, a counterclaim that defendant owed plaintiff for merchandise purchased was demurrable.—Thomssen v. Ertz, Minn., 101 N. W. Rep. 304.

140. SHERIFFS AND CONSTABLES—Sale of Homestead.—Sale of homestead by sheriff under execution conveys no title, and the officer making it is not liable for damages, except for costs incurred in removing the apparent cloud on the title.—Johnson v. [illegible]hell, N. Dak., 101 N. W. Rep. 318.

141. SHIPPING—Injury to Stevedore.—Under a charter party, the owner held required to furnish a "topping lift," so as to be liable for personal injuries caused by defect therein.—Connors v. King Line, 90 N. Y. Supp. 652.

142. SPECIFIC PERFORMANCE—Vendor and Purchaser.—An assignee of an original vendee of a lot of land held not entitled to specific performance as against subsequent vendees, relying on the original vendee's statements that he had abandoned the contract.—Cox v. Raider, Mich., 101 N. W. Rep. 531.

143. STATUTES—Municipal Corporations.—Municipalities may be classified for purposes of legislation on the basis of population, having a reasonable relation to the purposes of the legislation.—L'Hote v. Village of Milford, Ill., 72 N. E. Rep. 399.

144. STREET RAILROADS — Duty to Prevent Collision with Frightened Horse.—A street railway motorman held bound to bring his car under control so far as possible on seeing a frightened horse and vehicles in a narrow space, to prevent a collision.—McVean v. Detroit United Ry., Mich., 101 N. W. Rep. 527.

145. STREET RAILROADS—Injuries to Child on Track.—A child nine years and three months old, killed while playing in the street by being struck by a street car, held required to use only such care as similar children use under similar circumstances.—Dempsy v. Brooklyn Heights R. Co., 90 N. Y. Supp. 639.

146. TRIAL—Requested Instruction.—When a special request is made for an instruction reflecting either a meritorious cause of action or ground of defense, the court should either give it or substitute another embodying the same principle.—Western Mattress Co. v. Osergaard, Neb., 101 N. W. Rep. 334.

147. TRUSTS—Dividend from Proceeds of Sale of Property.—A dividend declared and paid by a manufacturing corporation from the proceeds of the sale of its principal plant and business held not net income from the stock to which a life tenant under a deed of trust was entitled as against the remaindermen, but in substance a partial distribution of capital.—Mercer v. Buchanan, U. S. C. C., W. D. Pa., 132 Fed. Rep. 501.

148. WATERS AND WATER COURSES—Dams, Flooding Land.—The owner of a dam acquires no prescriptive right to injure his neighbor's land by saturating the soil, without overflowing it, because the dam has been maintained for 20 years.—Carrington v. Brooks, Ga., 48 S. E. Rep. 970.

149. WILLS—Witness, Interest.—Where an attempt is made to discredit a witness because of interest, he may be allowed to show similar statements made when the motive did not exist.—Sweeney v. Sweeney, Ga., 48 S. E. Rep. 984.

150. WITNESSES—Competency.—In a suit to set aside a deed as fraudulent, brought against the grantor and the executrix and heirs of the deceased grantee, the executrix and heirs held entitled to question the competency of the grantor as a witness.—Roberts v. Nack, 90 N. Y. Supp. 526.